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Volume I

The Ownership and Use of Land

including

Its acquisition by Deed, Descent, Will, Occupancy, Prescription, Public Grant; also Life Interests, and Rights of Married Men and Women, of Homestead Owners, of Landlords and Tenants

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NEW YORK
Doubleday, Page & Company
1908

Published, October, 1905

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1. EVERY individual in our country lives under three forms of government—national, state, and local; and his rights and duties as a member of each are defined by constitution, by statute and by common law.

2. Besides the laws defining the legal relations which exist between government and its members are other laws defining the legal relations between the people themselves. These laws are very numerous and in many respects touch the people more closely than the laws defining their public relations.

3. Many of the acts of individuals are double-sided—are both public and private. Thus, should the cashier of a bank rob it, he would be a debtor to the institution for the money stolen; also a wrong-doer to the public and answerable for his offence. Even if he should become repentant and refund the money stolen, he would be just as liable as before to arrest, trial and condemnation. It is true that the officers of a bank, after such an offence has been committed, are often willing, for the sake of recovering a portion, or all, of the property stolen, to overlook the misdeed and to protect, as far as they can, the criminal from punishment. In truth, they cannot give any legal protection; but they may darken the pathway of the public prosecutor by withholding testimony.

Another illustration may be given. A assaults B, boxing his ears. The wrong-doer is liable to B for the damage, the payment of money, which is the legal balm for the wound—often a poor medicine, but the most effective the law can prescribe. Yet, A, however privately he may have acted, in assaulting B, has committed a public offence, and no settlement with the injured man can prevent the state, through the public prosecutor, from arresting, trying and convicting him for his misdeed.

The individual, or private remedy, which consists in recovering money for the injury done, is called the civil remedy; the public action or prosecution by the state, the criminal remedy, and may result in imprisonment, or fine, or both.

4. This double-sidedness of human action from the legal point of view covers a large breadth of human

conduct, but is not unvarying. The state may declare a misdeed, for which only a money damage could previously be recovered, to be a public or criminal offence, and punishable in the same manner as other public offences. Thus, not many years since, the buyer of merchandise who misrepresented his wealth for the purpose of obtaining credit was liable only in a private action for the damage or injury caused by his deceit; now, very generally, he can be tried and punished as a criminal. On the other hand, criminal offences are sometimes abolished; punishments especially are lessened. That the consequences of wrongful conduct are seen with ever-increasing clearness to affect the public, as well as one or more particular individuals, and therefore to be deserving of proper legal condemnation, while punishment for many of the older offences are observed to be diminishing in severity, are sure marks of advancing wisdom in administering justice.

5. The private rights and duties of individuals pertain to the acquisition, use, and disposition of property; to the association of individuals in various ways for the same purpose; and to the establishment and maintenance of social and industrial relations. Hence the law defining these rights and duties has a threefold division. The larger division defines the rights and duties of individuals in acquiring, using, and disposing of their property; a second division, of rapid growth and importance, defines the rights of individuals to associate as partners, corporators, and in other ways, to hold, use, and enjoy property; while a third division defines the rights of individuals to form social relations such as

husband and wife, as master and servant, and the like, and then defines their rights and duties with respect to their conduct, their contracts, the acquisition and enjoyment of their wealth. The private rights and duties of individuals, thus outlined, it is our purpose to set forth in the following pages.

6. In executing the law, the officers of the government assume that every man knows it; he cannot, therefore, shield himself by confessing his legal ignorance. Nevertheless, the laws are so numerous and conflicting that not all are known, even by the most intelligent men. In truth, only a few of the laws are known generally by the people.

7. Why, then, are not infractions more frequent? The answer is, that the intelligence and good sense of the people lead them to pursue a course of conduct in harmony with the law; so, without actual knowledge, they walk, for the most part, in the straight legal paths.

8. Yet there are many occasions when one's intelligence utterly fails to discover the legal rule. On these, the sure path can be known only by inquiry. For this reason, an actual knowledge of the law is a daily necessity to escape unintentional wrongdoing. The non-possessor who relies on his sense of right is sure to fall into unhappy and costly errors. For example, a person who receives a check from another is required by law to present it to the bank on which it is drawn, within a specified time, for payment. A receiver who disregards this rule and retains the check for a longer period, as is often done through forgetfulness, assumes the risk of loss; and, should the bank on which the check is drawn fail, he

cannot go to the person who gave it to him and ask for another. How long then can he keep it without releasing the drawer? One's sense, however keen, can never answer the question. Only by actual knowledge of the legal rule can the receiver know how long he can safely retain the check and hold the drawer or maker liable. Nothing less than an actual knowledge of the law, therefore, can serve as a sure guide for individuals in their conduct with one another in their business and other relations.

9. In this work, it is our purpose to state all the more important legal rules or principles that apply to persons individually, or to those who are associated with others in the ways recognized by society. It is not our purpose to state every rule; for this would be quite impossible. Besides, the law is a vast body of rules, that, like the sea, are never at complete rest. Courts and legislatures are always changing them; hence no man at any particular moment of time can ever present a complete exposition. But we assume that the intelligent members of society, both men and women, are desirous of knowing what they can, and cannot, do in the numberless relations of daily life; and the most important and abiding of these rules, it will be our purpose to describe.

10. Whence are the legal rules that apply to us derived? First, they may be divided into two kinds or classes: statutes and common law principles. The statutes are enacted by legislative bodies; the common law rules are emanations of judicial tribunals. From what source do the courts obtain them; are they law-makers as well as administrators of the law?

11. The first and most important source is custom. A farmer once sold a mill owner a large quantity of timber, for which the seller was to be paid a stipulated price per foot. After the timber was cut and delivered at the place appointed, a day was set for measuring it. The farmer was surprised on learning that the buyer proposed to apply a mode of measurement quite unknown in that vicinity, which would lessen the quantity about one-fifth. He declined to accept that mode of measuring, and a law suit resulted. Had the parties agreed to a specific mode of measurement, of course they would have been bound thereby; not having done so, the court declared that it must have been their intention to be governed by custom; therefore, the question for the court to ascertain was, what custom prevailed. In time, this was clearly found out and declared, and it thus became a rule of law. Very many of the rules of the common law have their origin in this manner. They rest on custom which, through proper inquiry, is clearly ascertained and declared to be binding on all the persons within a state, where the custom is general; or within a narrower jurisdiction, where the custom is local.

12. Another source of the common law is the court itself. There are many occasions in which no rule of law exists to apply to a particular set of circumstances. This is especially so with respect to questions growing out of new business relations; the use of the telephone and the telegraph, for example. A few years ago there were several questions of this nature resulting from the use of the bicycle. To some of them, old principles were applied; to others, the courts adopted

such rules as the exigency required. In so doing the courts did not pass beyond their proper function; yet they make laws as truly as legislators in Congress, and, were they not endowed with this right, society would suffer.

13. Besides these two great sources of the common law, we have also mentioned the statutes, some of which modify the rules of the common law; others are an addition to them. Recently, a statute has been adopted in about twenty-five states regulating the law of negotiable instruments. In most regards, this law is founded on the common law, and is in harmony therewith; but, whenever adopted, it supersedes the common law; and henceforth individuals living in those states must look to that, so far as it can serve as a guide, and no longer to the common law that existed before its enactment.

14. Lastly may be mentioned legal decisions that are interpretations of statutes. There are many of these. Some statutes are the cause of constant questioning and answers. No statute can be written so plainly as to preclude all possibility of dispute. Such, in brief, are the sources of the legal rules that are to be set forth in this work for the benefit of all who wish to know their legal rights and duties.

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(Volume is indicated by Roman numerals)

Volume I

THE OWNERSHIP AND USE OF LAND

CHAPTER I

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1. PROPERTY falls into two great divisions, real and personal; and, while the differences between them on the outer boundaries are clearly seen, as they approach each other these differences lessen until one is in doubt whether a particular thing, for example, a cooking-range in a house, is real or personal property. Nevertheless, as both kinds of property exist, we must seek to show what they are.

2. Why is this knowledge important? A stranger, by the permission of a land-owner, builds a house on his land. There may be some agreement between them concerning it, though not in writing. The land-owner sells the land, and the purchaser, soon after taking possession, enters the house and astonishes the occupant by saying that it belongs to him. After stating his agreement with the seller, the buyer replies that he knows nothing about it; that he bought the land which includes everything thereon, that if any wrong has been done, the seller is the guilty party to whom the house-builder must look for redress. Thus, what is meant or included by the terms, real property and personal property, is important to all who are concerned in their sale, management, or ownership.

3. Real property is land extending indefinitely upward and downward. It includes every structure and everything growing thereon naturally. In like manner, all minerals are included, even an aërolite that falls from the heavens.

4. Ice is sometimes included, but not always.[1] Ice on a navigable river, whose bed belongs to the state, belongs

[1] See Chap. IV., Section 12, § 10.

to the first appropriator. This may be done by taking the ice, or by clearing off the snow from the surface, marking the ice, or making any other preparation for harvesting the cooling product. And the same rule applies to ice on public ponds.

Ice on a non-navigable river belongs to the owners of the adjoining land, because they are also the owners of the bed of the stream. The line of division between them, which is presumably the middle of the stream, determines the ownership of the ice that forms on the surface. To a navigable stream, owned privately, and not by the state, the same rule applies as to a stream not navigable.

The same rule, slightly qualified, applies to land-owners along a canal. They, too, can harvest the ice formed on the water running through their land, providing this does not interfere with the public use of the canal. But, when the state has condemned and taken the land used for the canal, it is the absolute owner, and the adjoining proprietors have no more rights in the land, water, or ice than they have in any other public property.

5. A different principle applies to things annexed by man. Many of these, as the result of annexing them, form a part of the land itself; while other things retain their former character and are personal property. In the sale or lease of land, it is often difficult to decide whether the things thus added are transformed into realty and become a part of it, or whether they are still personal property belonging to the person who put them on the land.[1]

[1] See § § 16, 17 of this Chap. and Chap. IV., Section 5, § 33 for a fuller consideration of this subject.

6. Questions often arise in conveying land on which crops are growing. Do these pass to the purchaser? The more general rule is, annual crops planted by the seller pass with the land on which they are growing; crops that are mature, awaiting the reaper, do not thus pass, unless they are mentioned in the deed of conveyance.[2]

Growing annual crops may be the subject of a valid oral sale, and the vendee has an implied license to enter and take them. Should the vendor afterward sell the land itself and say nothing about his prior sale of the crops, the crop-buyer, if the purchaser had come into possession, would lose the right to enter and take his crops. He would not be without a remedy, however, for he could proceed against the vendor, who, through accident or fraud, had deprived him of the right to take his crops away.

7. A different rule applies to a devisee, or person who inherits land by will. He takes the crops with the land, whatever be their state of maturity, unless they are needed to pay the debts of the testator. If they are, then they pass to the executor like other personal property, and are devoted to the payment of the testator's indebtedness.[3]

8. Growing trees may be cut down and thus converted into personal property; or, on the sale of land, may be reserved for the purpose of cutting and removing them. In the latter case, should the owner die before cutting them, the administrator or executor of his estate would

[2] Washburn on Real Property, § 11, Vol. I., p. 11 (6th Edition).

[3] Pattison's Appeal, 61 Pa., p. 294.

take possession of them as a part of his personal property. Again, the owner of land who sells trees growing thereon to another by a proper written conveyance, with the liberty to cut and carry them away, parts with an absolute interest in them, while the land itself remains in the sellor or grantor.

9. What rule applies to a tree standing on or near the boundary line, with roots and branches extending into the land of the adjacent owner? The fruit belongs to the owner of the land whereon the tree grows; and he can reach over and pluck it, if his arms are long enough, without infringing the law of trespass. He can even stand on the fence and do this. But he cannot go on his neighbour's land without permission for this purpose. If he did, the law would pronounce him a trespasser. The reader may think that the distinction is very fine between reaching over into another's land and plucking fruit, and going on another's land and plucking it; the law is replete with equally subtle distinctions. If the first rule be true, the reader may ask, what becomes of that greater rule stated in the beginning, that land includes everything above and below? On the other hand, the adjacent owner has a right to lop off the branches and roots of a tree to the dividing line.

The body of a tree that happens to stand on the dividing line is the common property of both; neither can cut it down without the other's consent; nor even cut away the portion on his own land, should the tree thereby be injured.

10. Things easily moved may become real property. This is especially so of things used in connection with

real property that are useless after severing them. For example, a key to the door of a house is an essential part of the door itself, and is, therefore, realty like the land whereon the house stands. In like manner, the doors, windows, blinds, and other portions of a house that are readily removable, the mill-stones of a mill—all are parts of the structure to which they belong, and, on its sale, they pass with the structure itself, because, on the one hand, they are essential thereto; on the other, they would be of no use to the grantor were they retained by him. Other illustrations of the same nature are hop-poles piled in a yard, fence-rails, and loose stones used in wall-building. While the application of this rule to many things is very plain; to others its application is difficult. For example, the animals employed in husbandry—farming utensils, plants, doves in the dove-cote—are still often matters of legal contention on the sale of land.

11. Sometimes a mine or quarry is owned by one person, and the surface by another. When this double ownership of land exists, it is the duty of the mine owner to guard the surface from injury by sinking. To this extent, the subterranean or mining property is subservient to the surface. In other words, where the upper and underground are owned by different individuals, the maxim of the law that applies to each one is, he must not use his own in a way that will injure the other.

12. As land owned by a corporation is real property, in a few cases the shares of the corporation itself are of a like nature. Generally, they are personal property. But, when the land held by a corporation belongs to the

stockholders, and the corporation is only a manager, the shares are real property. This is true also of the shares of a corporation created solely for holding, using, or improving real estate.

13. In some states, a church pew is real property; in others, personal property. Unless one's rights are regulated by statute or positive law, his interest is limited or qualified; a right of occupancy under some restrictions. He has an absolute and exclusive right to the possession and enjoyment of it for the purpose of public worship, and may maintain an action against any invader. Should he assign or lease it, the new occupant would have a right to occupy only during public worship, for that purpose and matters relating thereto. A tramp, therefore, could not, by leasing a pew, acquire the right to convert it into a place of shelter; nor a peanut vendor, a stand for selling his favourite fruit. The annual renter of a pew "has at most only a lease-hold interest for the term."

"The English ecclesiastical law forms the basis of the law regulating the affairs of the Episcopal Church in this country, and is in force, except as modified by statutes and the usages and canons of the church." [1]

All the other religious societies have special laws, usages, and local customs that regulate, to a very considerable extent, the rights and duties of the pewholders.

The trustees of a free church, charging for the sittings, have authority to decide where attendants shall sit,

[1] Kerr on Real Property, § 36, p. 34.

"and may, by force, remove one who persists in sitting in a place other than that assigned to him." [1]

The absolute sale of a pew does not give the pewholder an absolute right to the property, as would the sale of a piece of land. He gains "simply a right to occupy, under certain restrictions, the pew during public worship of the congregation, and, possibly, of sitting therein at meetings of the society held for temporal purposes."

Having no title to the soil beneath the pew nor to the space above, he cannot build a vault in the earth, nor decorate the pew in harmony with his tastes, however artistic or grotesque they may be. Again, the rights of a pewholder of a church that has been destroyed by fire, or abandoned, are gone. So, too, after the sale of the edifice or the ground, he cannot share in the proceeds. Nor can he compel services to be held in the church, or prevent its abandonment; or the rebuilding of another. Lastly, a writer has declared that a congregation which abandons its meeting-house as a place of public worship, although it be fit for that purpose, and erects a new one on a different site, is not liable in any way to the proprietor or lease-holder of a pew in the old meeting-house, unless the society acted wantonly, or sought to injure him. [2]

As a society possesses such large rights to sell, remove, rebuild, and the like, its rights to make repairs, however extensive they may be, are paramount to the rights of the pewholders.

14. One who purchases, and has conveyed to him, a

[1] Kerr on Real Property, § 38, p. 35.

[2] Ibid, § 42, p. 38.

lot in a public cemetery does not acquire the fee thereto; only an easement or license to bury therein. So long as he is in the rightful possession of the lot, he may maintain an action against a trespasser, and especially against one who enters and disinters the remains of a person buried there; in some states, this is made a penal offense. The common law recognises a right of property in a shroud, or apparel of the dead, as belonging to the person who had charge of the funeral. In Indiana, the bodies of the dead belong to the surviving relatives in the order of inheritance, like other property, and the courts possess the power to protect the relatives in the exercise of the rights of burial. In Minnesota, a widow recovered damages for the dissection of the body of her deceased husband. In Pennsylvania, it has been held that a widow's control of the body ceases at burial, and, therefore, the disposition of it belongs to the next of kin. In Rhode Island, the courts have decided that a widow has a right to recover the body of her lamented husband when it has been buried by the next of kin in a particular cemetery against her wishes.

The burial of a dead body in a cemetery lot is the only possession necessary to create a complete ownership of the easement and render it heritable. Again, so long as a gravestone marks a place for burial, the possession is adverse to all other claimants. The paramount right of burial is in the surviving husband or widow.[1]

A person who has erected in a cemetery lot a gravestone or monument, which is defaced or removed during

[1] See the recent case of Pettigrew v. Pettigrew, 207 Pa., 313, for other points and references.

his life-time, may receive damages from the wrong-doer. And when this is done after his death, the heirs of the person in whose memory the stone was erected can maintain an action against the defacer.

The rightful possessor of a lot may transmit it to his heirs at law. Possession once established, unless voluntarily given up, continues as long as the graves are marked and the cemetery is used for that purpose.

As the right of burial is not an interest in the soil, if the friends of a person buried there are required to remove his bones, because the ground can no longer be used for this purpose, they cannot recover any compensation. Usually, cemeteries are subject to public regulations. The purchaser of a lot acquires no title to the land; simply the exclusive right to bury therein so long as the cemetery is used for that purpose. The right, therefore, "is revocable whenever public necessity requires."

15. Sometimes money, the most fluid of all things, partakes of the character of realty, or of the incidents and attributes of real estate. Money, which by agreement is to be invested in land, equity regards as land; vice versa, land which is to be converted into money, as money.

Again, a man who, in his will, directs that land shall be sold and the money paid over to an alien, may have his wish executed, though the alien could not have taken the real estate.

16. The two most important rules to apply to the question, whenever it arises, whether a thing should be regarded as real or personal property, are intention and use. Intention is inferred from the nature and mode of annexing the thing and the situation of the annexor;

his relation to the land, and the policy of the law. A house, for example, built on another's land with his permission, is, between the parties, the builder's personal property;[1] otherwise, it belongs to the owner of the land. Again, a structure erected by a tenant during his tenancy, by virtue of an agreement to remove it before he goes away, is his own personal property, and he has a right to remove the structure at the expiration of his lease.

A, who was a land-owner, agreed with B that he might build a barn on his land. B was to hire the barn and remove it whenever he desired. Afterward, A sold the land to C, they agreeing that the barn should not be included in the sale and conveyance. C sold the land to D, saying nothing, either through forgetfulness or design, about the barn. D, supposing the barn passed to him by the conveyance, insisted on retaining it; and the court decided that he was the owner, unaffected by the agreement made by former owners. Of course, a different principle would have applied had he known, or believed, that B had built it by virtue of an agreement with A. B, therefore, was deprived of the ownership of his barn, for D was an innocent purchaser. B had a claim against C for its value, but a claim of this kind against another who may be worthless is a poor equivalent for the thing itself.

17. The use to be made of things is often important in determining whether they are real or personal property. Thus, the blinds of a house that have been fitted, and are temporarily off at the time of the sale for the purpose of painting or repairing them, pass with the sale of the house itself, and, for the reason that perhaps they could

[1] Kerr, § 67, p. 63.

be used nowhere else. In like manner, a farmer who has a large quantity of cut timber on his land, and especially who has been in the habit of selling it, may remove it within a reasonable time, because no use could be made of a large quantity of timber on the land itself. The quantity, as well as the ordinary practice of the farmer, would be decisive in fixing the nature of the timber. On the other hand, if he was in the habit of cutting timber occasionally for the purpose of converting it into fences or boards for farm use, this would be equally conclusive of his intention concerning a few sticks that might happen to be lying on the ground at the time of the sale.

Another illustration of the same nature is the existence of a quantity of peat, wood, or other fuel on a farm at the time of its sale. If the quantity is small, the law presumes that it was prepared for use on the land, and it goes to the purchaser; if the quantity is large, the opposite presumption will be applied, and it will be retained by the vendor as personal property.

A curious case may be added: that of a landowner who quarried a large stone, designed for a tomb outside his farm, and sold his land, giving the purchaser notice of his intention. This stone, as the court held, was his personal property, though it remained in that place for more than thirty-five years after selling his farm.

18. It may be noted that, in describing the things that are on the dividing line between real and personal property, we have been looking at those which concern sellers and buyers of land. Between landlords and tenants, mortgagors and mortgagees, and other parties, different rules apply; which will be hereafter given.

CHAPTER II

ABSOLUTE OWNERSHIP OF LAND

§ 1. By Citizens

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1. The law relating to real property was brought from England, and bears many marks of its feudal origin. Though it has not been modernised like the law concerning personal property, yet many elaborate and technical principles have been swept away, leaving a residue easier to comprehend.

2. By absolute ownership is meant the largest and most complete dominion one can possess in land. Generally, the word estate is used in the law books instead of ownership to indicate one's interest in land. The usual phrase to indicate an absolute estate, or unlimited, unrestricted ownership, is "fee simple."

No one, in truth, can acquire absolute dominion, because the state, notwithstanding the large freedom enjoyed by everyone, possesses an undoubted right to take land for public purposes; or rather, to use it as the public needs may require. Thus, as we all know, the state is taking lands for roads, buildings, water reservoirs; and, as civilisation expands, other public uses may arise. Vast quantities have been taken for railroad purposes under the right, as it is called, of eminent domain. In other words, a railroad corporation is a public instrument or agency to such an extent that the state permits the taking of such lands as may be needed for the proper and effective execution of its purposes.

Another illustration may be given. Fifty years ago, some of the New England states authorised the manufacturing companies to acquire the right to flow land belonging to individuals for the purpose of acquiring water-power. This authority had its origin in the inability of manufacturing companies to purchase the rights of flowing land on reasonable terms, or, in truth, on any terms whatever. Perhaps it is the largest invasion of the right of absolute ownership of land ever exercised in this country, and the courts, on more than one occasion, have questioned the legality of the proceeding. Yet the absolute, unrestricted ownership of land is unknown in this country or in any other. Nevertheless, in a practical sense, individuals are the absolute owners of a large portion of our country, acquired, as we shall soon learn, in various ways.

3. Let us begin by inquiring who can acquire or hold real property. Possibly, the reader may think that

everybody has this right, yet there are some limitations. There was a time, indeed, when aliens were under various restrictions; and some of the early laws on this subject are curious reading, remembering that those who made them had been in the country only a few days or weeks longer than those to whom they were applied. Long ago, most of the states enacted laws providing that aliens who were, or intended to become citizens, might acquire and hold real property like other persons.

4. Some restrictions are also placed on corporations in purchasing and holding lands. By the common law, a corporation could hold and dispose of real property for any purpose not inconsistent with the object of its creation. By general or special statute, a broader restriction has often been placed on corporations. Generally, their right to acquire and hold real estate is determined by their charters, or by legislative enactment. A national bank, for example, is permitted to hold real estate for its banking-house. It may acquire real estate in the discharge of a debt; but, whenever this happens, it must sell the land at the end of five years by auction, unless it is fortunate in selling sooner by private sale. In other words, a bank is not chartered to deal in real estate, and the law will not permit the association to depart from the real object of its creation. In like manner, a railroad company, though possessing special rights to acquire land or an interest therein for the purpose of building its tracks, stations, and offices, cannot purchase real estate with the same freedom as an individual. It could not, for example, invest its surplus in real estate as absolute

owner, with the view solely to a future profitable sale. Very likely railroads and other corporations transgress to some extent this provision of their charters; their transgressions, however, do not change the law.

Again, though a corporation may transgress its fundamental law in making improper or illegal purchases, a vendor cannot complain and seek to recover the lands he may have sold, should they rise in value, on the ground that the corporation had no right to purchase them. First, because he, too, is a joint sinner in selling to the corporation; second, because, if anyone has been wronged, it is the state, which alone has the right to call the corporation to account for its misdeed.

5. In acquiring the absolute ownership of land by a deed or written conveyance, to gain a perfect title it is necessary to use the word "heirs." The title thus acquired is known as a "fee," or "fee simple." It is one of the old terms that has come down to us from the rugged feudal age. This is a very arbitrary rule or principle. "Still," as an eminent author has remarked, "it is as imperative, as a rule of law, now as ever. No synonym will supply its place. Even a grant to 'one and his *heir*' will give him only a life estate, or to one '*or* his heirs'; or to one and 'his heirs during the life of another', or to one 'forever', or to one 'and his assigns forever.'" [1]

Yet the rule is not quite so arbitrary. In an absolute estate given to one by a legislative grant, the word "heirs" is not needful to convey such an estate. An intention to create it, clearly shown by any form of expression, will suffice.

[1] Washburn, § 53.

By statutes, also, in many states, it is not necessary to use the word "heirs" to create an absolute estate. Any equivalent words may be used that clearly show the grantor's intention to convey such an estate to the purchaser.

Again, this strict rule does not apply to a grant or conveyance of land to a trustee for the benefit of others. He acquires the needful legal estate for the proper execution of his trust and no more, without regard to the words used in the deed. Thus, a grant to A and his heirs as a trustee for the life of B conveys an estate to the trustee for B's life only. Again, a grant to A in trust to sell conveys an absolute interest; in other words, A can sell and convey an absolute title to the buyer.

6. In conveying land by a will, a more liberal principle prevails. In these cases, the intention of the testator is regarded and creates the rule. This is enough to convey an absolute interest without the use of the word "heirs." Thus, the use of the words "all," "right," "property," "inheritance," "in fee simple," have proved sufficient to transfer an absolute title in the property devised without using the technical words required in a deed of conveyance.

7. Again, one to whom lands are given by will, that are charged with the payment of money, will hold them as an absolute gift; for the testator intended to make him the object of his bounty. Otherwise, the recipient might die after paying the money and lose the whole benefit of the devise.

8. Lands held absolutely, or "in fee simple," are subject to the debts of the owner, as well after his death

as during his life. This is a radical departure from the old English law. Says Lord Romilly in his Autobiography: "The heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors."[1] From this rule, a logical development of the feudal system, the reader can mark the long advance which subordinates the wishes and rights of the heir to the just claims of creditors.[2]

9. One of the most important incidents of a "fee simple," or absolute estate, is the unrestricted right of sale. This right, so long of slow growth, is now as firmly established as any other principle of law. A limited, reasonable restriction on the right of sale or transfer will be upheld, and the purchaser or grantee may forfeit his estate by violating it. Thus, in a devise to A and his heirs, a limitation may be made that, if A in his lifetime fails to convey the land, it shall go to another person, who is named. Such a limitation would be valid. But a condition restricting the right to sell to a single person only would be void, as he might happen to be incapable of purchasing.

§ 2. By Aliens; Citizenship

1. On what does citizenship depend.
2. Children born abroad of American parents.
3. Limitation to above rule.
4. Our laws cannot affect persons living under another jurisdiction.

[1] Vol. II., p. 389. See Section 2, § 11.

[2] See note 1, Williams on Real Property, p. 81 (6th American Edition).

5. Naturalisation is a federal function.
6. Merchant seamen.
7. Soldiers.
8. Who cannot be naturalised.
9. Females are included.
10. First step; Declaration of one's intention.
11. Declaration of minor.
12. Effect of declaration.
13. Length of residence required.
14. Meaning of continued residence.
15. Where application should be made for admission; Requirements.
16. Applicant's moral character.
17. Foreign title must be renounced.
18. Rights acquired by widow and children of applicant.
19. Private citizen can take no action to set aside an order of admission to citizenship.
20. Federal government can act.
21. Effect of naturalisation on children.
22. Effect of marriage by foreign woman to American citizen.
23. Husband need not have been an American at time of marriage.
24. Effect of marriage by an American woman to an alien.
25. Effect of alien husband's death on citizenship of an American wife.
26. Effect of her divorce from him.
27. Naturalisation by treaty.
28. Disabilities of alien land ownership.

1. Every nation determines for itself who shall, and who shall not, be its citizens. By the laws of some states, citizenship by birth depends upon the place of birth; by the laws of others, citizenship depends upon the nationality of the parents. The latter is called the law of nations because it is the rule in many of them. In the United States both rules exist, but more generally the former. By numerous decisions the law is clearly established that the children born to foreigners, in the United States, are citizens of the United States.[1]

2. Citizenship is also conferred on children born in foreign countries whose fathers were at the time of their birth, citizens of the United States. The federal statute provides that "all children born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."[2] But if a child is born after his father has in any way expatriated himself, he is to all intents and purposes an alien and not entitled to the protection of the United States.

3. If the father was born abroad and has always resided there his child is not a citizen, for the statute says that the rights of citizenship shall not descend to children whose fathers never resided in the United States.[3] "This limitation," says Van Dyne, "of the privileges of citizenship to the children of citizens who have resided in the United States was designed to prevent the residence

[1] Re Look Tin Sing, 10 Sawyer, 353.

[2] U S. Comp., 1901, § 1993.

[3] Ibid.

chosen of successive generations of persons claiming the privileges of American citizenship while evading its duties." [1]

4. Again, while our government may confer the rights and privileges of its citizenship on persons born of American parents in other countries, "it cannot extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction from their obligations or duties thereto; nor can it, by undertaking to confer its citizenship upon persons who have never come within its territory, interfere with the just right of the foreign government to control its own subjects." [2]

5. In the United States by the Constitution, the naturalisation of foreigners is a purely federal function. This has been defined to be the act of adopting a foreigner and clothing him with the privileges of a citizen. And the effect of naturalising one is not affected in any way by the laws of the applicant's country. It is immaterial whether he had, or had not, permission to emigrate from the country of his origin.

6. Merchant seamen also are favoured. Every seaman, though a foreigner, who declares his intention of becoming an American citizen in any competent court who shall have served three years on board of a merchant vessel of the United States subsequent to the state of such declaration, may, on his application to such tribunal and the production of his certificate of discharge and good conduct during that time and also the certificate of

[1] Citizenship of United States, p. 34.

[2] Secretary Fish to President, Van Dyne, p. 35.

his declaration of intention to become a citizen is thus admitted.[1] This provision was applied thirty years ago to a native of France who had declared his intention to become a citizen of the United States, and who subsequently served as seaman and steward on American merchant vessels for more than twenty years. He claimed the protection of the United States from arbitrary arrest and imprisonment by the Spanish authority of Cuba, and it was promptly regarded. The Department of State interfered in his behalf and ultimately he received $5,000 as a recompense for the wrong thus inflicted on him.

7. Any alien of the age of twenty-one or older who has enlisted and been honorably discharged from the United States Army, may be admitted to citizenship without any previous declaration of his intention. A somewhat different rule applies to those who have served in the navy or marine corps. The former must serve "five consecutive years," and the latter "one enlistment."[2]

8. Not all aliens can be naturalised. The first exceptions are the citizens or subjects of a "country, state, or sovereignty" with which the United States are at war. A Spaniard, for example, could not have been naturalised during the war with Spain. "The courts have," says Van Dyne, "at different times, held that neither Chinese, Japanese, Hawaiians, Burmese, nor Indians can be naturalised."[3]

9. Naturalisation laws include females as well as males. And an alien wife may be naturalised without the consent of her husband.

[1] U. S. Comp. § 2174. [2] Stat., § 2166. [3] Van Dyne, p. 57.

10. The first step in the process is to declare one's intention. The applicant must declare on oath, before "a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction and a seal and clerk, two years at least, prior to his admission, that it is his bona fide intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty."[1] This declaration can be made immediately after his arrival in this country. Having declared his intention, he is then entitled to a certificate, containing a copy of his declaration, duly attested by the clerk and seal of the court.

Besides the specific courts above mentioned, others are included having common law jurisdiction. The term is broad enough to include city, police, and country courts which preserve their records and have a recording officer who acts as clerk.

11. A different rule applies to a minor. If he has lived here three years "preceding his arriving" at the age of twenty-one, he may then "make application to be admitted a citizen,"[2] without having made a declaration of his intention, and two years afterward he may be admitted.

12. This declaration of intention has no effect either in the way of naturalising or expatriating the applicant. He simply records his intention to renounce his present allegiance on becoming a citizen of the United States. He

[1] U. S. Comp. 1901, § 2165.

[2] Stat., § 2167.

still remains an alien until his naturalization is completed. "The law, justly regarding a change in his allegiance by a foreigner as an act of grave importance, wisely provides that there shall be two steps in the process. By the first, the purpose of change is announced. Between this and actual naturalisation the lapse of a considerable interval is required in order that the final step may be taken with due deliberation." [1]

"Can the declaration of intention," inquires Van Dyne, "confer any right of citizenship? While the laws of several of the states of the Union extend the right of suffrage to aliens who have declared their intention to become citizens of the United States, a state cannot make the subject of a foreign government a citizen of the United States, or confer on him the rights and privileges appertaining to such citizenship." [2] As the Circuit Court of Appeals has said: "A state may confer on foreign citizens or subjects all the rights and privileges it has the power to bestow, but when it has done all this, it has not naturalised them. They are foreign citizens or subjects still, within the meaning of the constitution of the United States." [3] Consequently if he goes back to his native country he returns as one of its citizens or subjects.

An illustration may be added in the way of showing an application of this principle. A Turk who had declared his intention contemplated a visit to his native land, and inquired of the Secretary of State if he could count on the intervention of the United States on his behalf.

[1] Secretary Fish, quoted by Van Dyne, p. 67.

[2] Ibid., p. 67.

[3] Minneapolis v. Reum, 6 C. C. A., 31.

Mr. Bayard replied that so far as his political rights were concerned a mere declaration of intention to become an American citizen would give him "no title to claim the intervention of the United States."

Just before the Cuban insurrection of 1869 many Cubans declared their intention to become citizens of the United States, and afterward returned to Cuba. The United States consul at Trinidad interfered in behalf of some of them and asked the Department of State to approve his action. But the Secretary could not. In his reply he said: "It has been repeatedly decided by this department that the declaration of intention to become a citizen does not, in the absence of treaty stipulation, so clothe the individual with the nationality of this country as to enable him to return to his native land without being necessarily subject to all the laws thereof. In the present unhappy state of things in Cuba the Secretary of State can see no reason for departing from so well established and so wise a rule." Mr. Van Dyne adds that in a few instances the Department of State has held that the declarant acquires, by his declaration of intention, a quasi right to the protection of this government while in a third country.

13. Before an alien can acquire citizenship here it must "appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least."[1] The reason for this requirement is obvious. During this period he can learn more perfectly whether he wishes to transfer his allegiance. "Persons," says Secretary Fish, "who may have declared

[1] U. S. Comp., 1901, § 2165.

their intention to become citizens often change their mind and fail to carry that intention into effect." Besides, he must reside here continuously. "No alien," so the statute declares, "shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission, resided within the United States." [1]

14. What is meant by continued residence? Van Dyne, after remarking that the word residence means a person's habitual physical presence in a country or place thus continues. "In its broad sense it means a place of abode, selected with the intention of remaining permanently or for an indefinite period. Taken in its broader sense, temporary absence from the United States, upon business or pleasure, might not be incompatible with continued residence here. The sole criterion would be the intention of the party. To determine this it would be proper to take into consideration the length of absence, its purposes and the circumstances surrounding the case." [2]

In 1868 this question arose in a case under the treaty between the United States and the North German Confederation. The attorney-general asserted that the residence of an applicant for naturalisation would not be interrupted by a transient absence for business, pleasure or other occasion, with the intention of returning. On the other hand, to return to one's original country and engage in business would negative such intention. Therefore, as Van Dyne says, "a temporary absence

[1] U. S. Comp., 1901, § 2170.
[2] Van Dyne, p. 83.

from the United States should not defeat the intention to become an American citizen," but he adds, "a study of the history of our naturalisation legislation does not clearly show this to have been the intention of Congress."

It appears therefore that absence for any length of time raises the question. "If the applicant," says Senator Berrien in one of the debates on the subject, "is absent any part of the time, it remains for the court to decide whether that absence is sufficient to prevent the issuing of the certificate." Van Dyne thus sums up the law: "If the facts and circumstances of the absence, as shown in the particular case, indicate no change of intention on the part of the applicant, it is the duty of the court to issue the certificate, without requiring such time to be made up. If there is evidence showing abandonment of intention, the applicant should be refused, and the party should be required to begin *de novo*."

15. The application for admission to citizenship should be made before the clerk of the court to which the preliminary declaration may be made. He must declare on oath that he will support the constitution of the United States, and that he absolutely renounces all allegiance to every foreign prince or power. To support the constitution clearly implies that he must have some knowledge of and regard for it. Therefore if he is without a proper understanding of it, his oath should not be accepted. Van Dyne states two cases not in complete harmony on this important matter. In the first, it was declared that "one who cannot read or write English but has read the constitution in a foreign lan-

guage, and knows that the United States has a president, but cannot mention his name, does not understand the principles of the government of the United States or its institutions sufficiently to become a citizen."[1] In the other case "an alien who was ignorant and unable to read and write, and who could not explain the principles of the constitution, was entitled to be naturalised, where it was shown that he was peaceable, industrious, of a good moral character and law-abiding."[2]

The statute also provides that it shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.[3]

Courts therefore require the testimony, under oath, of at least two citizens of good standing that of their own knowledge the applicant has been a resident of the United States five years at least, and of the state or territory wherein his application is made, one year.

16. What must he possess in the way of a moral character? He must not have been guilty of murder, robbery, theft, bribery, or perjury. Habitual gaming or selling of liquors, where forbidden by the statute of

[1] Re Kanaka Nian, 6, Utah, 259.

[2] Re Rodriquez, 81 Fed. 337.

[3] Stat., § 2165.

the state wherein the applicant lives, would be a bar to his admission. An anarchist also is excluded.[1]

17. The statute also provides that "in case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court."[2]

18. When any alien who has made a declaration of his intention to become a citizen and "dies before he is actually naturalised, the widow and the children of such an alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."[3] It need hardly be added that the declaration of intention and death of the declarant do not confer citizenship on the widow and minor children. They must also take the oaths required in other cases for admission to citizenship.

19. A private individual has no standing in court to institute a proceeding to set aside an order admitting an alien to citizenship.[4]

20. But if a decree of naturalisation has been obtained in a fraudulent manner in a state court, the United States can seek to have it cancelled by a federal tribunal. But the United States denies the right of a foreign govern-

[1] See cases cited in Van Dyne, § 31. p. 92.

[2] Stat., § 2165.

[3] Stat., § 2168.

[4] Re McCarren, 8 N. Y. Misc., 482.

ment to impeach a certificate of naturalisation issued by an American court.

21. The statute also provides that the children of persons who have been duly naturalised under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalisation of their parents, shall, if dwelling in the United States, be considered as citizens thereof and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof.[1]

But the naturalisation of a parent does not confer citizenship on his minor children born abroad before that event and who continue to reside and attain their majority abroad.

A emigrated to the United States from Germany in 1869 and was naturalised here in 1884. The next year he sent for his son, who was seventeen years old, to join him. The son was arrested just before starting and afterward discharged. A sought the intervention of our government, but the Secretary of State replied, that as the son did not emigrate with his father to America and therefore was not here at the time of the father's naturalisation, "and has not at any time since been a resident of the United States, he cannot be considered a United States citizen. Our laws require that the children of persons who have been naturalised here must be

[1] Stat., § 2172.

dwelling in the United States to be considered citizens thereof."[1]

22. By statute "any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalised, shall be deemed a citizen."[2] This language is broad enough to include any white woman or woman of African nativity or descent, or Indian woman.

23. The question has been raised, must the husband be a citizen at the time of the marriage, or will his subsequent naturalisation have the same effect? The highest legal tribunal has given a clear answer: "His citizenship, whenever it exists, confers, under the act, citizenship upon her. The construction which would restrict the act to women whose husbands, at the time of marriage, are citizens, would exclude the far greater number, for whose benefit, as we think, the act was intended."[3]

Must an alien woman, in order to be naturalised by marriage to an American citizen, have resided in this country for five years? On several occasions jurists have divided on this question, but the negative view, maintained by Attorney-General Williams of the United States, is decisive. The statute, however, so Mr. Olney, Secretary of State has maintained, "cannot operate to naturalise by indirection or by executive interpretation a person who is an alien by birth and origin, who has never been within the jurisdiction of the United States

[1] See Bayard, quoted in Van Dyne, p. 114.

[2] Stat., § 1994.

[3] Kelly v. Owen, 7 Wall., 496.

and who at the time may be dwelling within a foreign jurisdiction."

24. While an alien woman may become an American citizen by marrying an American, is the opposite rule true, that an American woman becomes an alien by marrying a foreigner?

Van Dyne describes many cases in which the question has arisen, and shows that the answer has not been uniform. Yet he concludes that "the decided weight of authority is to the effect that the marriage of an American woman to an alien confers upon her the nationality of her husband." An English author, Cockburn, wrote thirty years ago that "in every country,except where the English law prevails, the nationality of a woman on marriage merges in that of her husband; she loses her own nationality and acquires his." Since then the English law, has, by statute, been harmonised with that of other nations.

25. What is the consequence of her husband's death? does she still remain a foreigner? Van Dyne says: "The tendency of opinion seems to be in favour of allowing the woman, upon the death of her husband, to resume her American citizenship, if she desire, on condition that she return to the United States, if residing abroad." [1] This statement of the rule or practice may be reinforced by Cockburn, who says: "Provision is made, in all the continental codes, for enabling a woman whose nationality of origin has been changed into that of her husband, to resume, if so minded, her original nationality on becoming a widow; on the condition,

[1] Page 139.

however, if not resident in the country of origin, of returning to it."

26. One point more should be noticed. Does her absolute divorce from her husband affect her citizenship in the same way as the death of her husband? This question arose on the application of Mrs. Daisie Annie Newman Van Buren for a passport. She was the daughter of an American citizen and had married a Dutch Baron. Like so many other American women married to foreign barons who have proved to be bears or worse, the marriage relation was severed and she returned to this country. The answer to the inquiry was given by Mr. Hay, Secretary of State, to the American minister at Berne, Switzerland. "In accordance," the Secretary says, "with the view which the department has taken in several cases, when an American woman marries an alien, her condition from the standpoint of nationality is lost in that of her husband, as long as the marital union lasts. Upon its termination she may resume the nationality of her birth by returning to the United States to reside, if residing abroad, or acquire a new one. In this case Mrs. Van Buren's status under the laws of the Netherlands calls for no consideration. She does not live in that country, nor does she, apparently, intend to do so. Her divorce having been lawfully obtained, her marital relations with Baron Van Buren having ceased, her domicile being bona fide in this country, you may properly issue a passport in her favour."

27. Lastly, persons have been naturalised on several great occasions by treaty. The most noteworthy of these are the treaty of 1794 with Great Britain, with

France in 1803, with Spain in 1819 and 1898, and with Mexico in 1848 and 1853. The status of the Porto Ricans and Filipinos under the last treaty with Spain has been the subject of most elaborate exposition by the highest federal tribunal in the so-called Insular cases.

28. Though from an early period aliens have possessed large rights to occupy and enjoy the use of land, and to acquire and transmit the title thereto, yet they have not been entirely free from disabilities. Thus, in Idaho aliens who have not declared their intention to become citizens cannot acquire farming lands. Again, aliens may enforce liens and judgments against real property and may also inherit it; but, if it be not sold within five years, it escheats or belongs to the state. In Illinois, too, although an alien may acquire real property like citizens, it escheats to the state, unless he becomes a citizen within six years from the time of acquiring ownership. In other words, the policy of the state is to permit anyone to acquire and hold real property and to give him all the time necessary for becoming a citizen. If, on the other hand, he refuses to become a citizen, he is divested of ownership—a regulation which seems to be, in every way, wise, as the permanent ownership of real property ought not to be vested in persons residing in other countries.

In Iowa non-resident aliens may acquire and hold one hundred and twenty acres of real property, but no more, unless it is taken by devise or descent. When thus acquired it may be held for twenty years. At the end of that time it escheats to the state, unless it has been conveyed to a bona fide purchaser for value, or unless the

alien has become a resident of the state. The law in Kansas may be thus stated: A man may acquire real property if he has declared his intention of becoming a citizen, and may, during the succeeding six years, dispose of it in the same manner as a citizen on complying with the conditions of registry. Non-resident aliens, however, are debarred from acquiring the title to real estate, except by descent or devise; and when thus acquired, they must dispose of the same within three years, unless they are minors, who have two years longer. Should they not comply with the law, it escheats to the state, unless it has been sold to a bona fide purchaser for value. Minor aliens who are residents of the United States may acquire title to land by purchase, and may hold it for six years after declaring their intention to become citizens.

In Kentucky an alien may take by devise or descent, and hold the land for eight years. In Louisiana there are no statutory restrictions on aliens relating to real property. In Minnesota aliens who have not declared their intention to become citizens cannot acquire real property except by devise or inheritance. The law there does not apply to rights by treaties or to actual settlers who do not own more than one hundred and fifty acres. They may also acquire and hold lots of fifty feet frontage by three hundred feet deep in any incorporated city. In Texas a somewhat different regulation prevails. Resident aliens have the same rights as citizens, but, if they discontinue their residence, they must dispose of their real estate within ten years.

In Washington the ownership of lands by aliens who have not declared their intention to become citizens is

prohibited, except when acquired by inheritance, by mortgage, or in the regular course of justice in collecting a debt. Conveyances to, or in trust for, aliens also are void. But this prohibition does not extend to mineral lands and those necessary for their development. In Wisconsin non-resident aliens cannot acquire by purchase more than three hundred and twenty acres. Lastly may be mentioned Wyoming, in which non-resident aliens are not permitted to acquire any real estate, except by inheritance, or in the ordinary course of justice in collecting a debt.

From this review of the rights of aliens, it will be seen that the laws are extremely liberal, and aim at giving those who reside here and intend to become citizens the same rights as are enjoyed by the citizens themselves. The chief restriction is on non-residents—the law aiming to give them a few years in which to dispose of land that may come to them by inheritance or otherwise, and prohibiting them from retaining its permanent ownership. This is the general underlying idea of the legislation pertaining to aliens.

CHAPTER III

MODES OF ABSOLUTE OWNERSHIP

§ 1. Acquisition of Land by Purchase. Deeds

1. Agreement to purchase must be in writing.
2. What this must contain.
3. When an oral bargain can be enforced.
4. Money paid can be recovered.
5. Law of place of location governs the parties.
6. Kinds of deeds:
   a.—Quit-claim,
   b.—Indenture,
   c.—Warranty,
   d.—Lease.
7. On what a deed must be written.
8. Filling blanks.
9. Alterations:
   a.—Unimportant alterations,
   b.—Are they presumed to be made before or after the delivery of the writing?
   c.—The safe practice.
10. Lost deed.
11. Deed by minor:
   a.—Is his deed void or voidable?
   b.—What is a confirmation?
   c.—Illustrations.

12. Deed by insane person.
13. Deed by executor or administrator.
14. Deed by married woman.
15. Execution of deed through fraud.
16. Names of grantor and grantee should appear in deed.
17. Grantee must exist:
    a.—Deed to fictitious person,
    b.—To an estate of a person,
    c.—To future estates immediately given,
    d.—To estate in remainder,
    e.—To trustee of future estate,
    f.—To an unorganised corporation.
18. Need of seal:
    a.—No one need be present when affixed,
    b.—Several may use same seal,
    c.—Seal of corporations,
    d.—What is a seal?
19. Witnesses.
20. Execution by agent or attorney.
21. Mode of signing.
22. Reading of deed by grantor.
23. Dating.
24. Delivery:
    a.—Test of, is control,
    b.—Deed must be complete,
    c.—May be actual or verbal,
    d.—Delivery by, or to, a corporation,
    e.—Delivery to unknown grantee,
    f.—Delivery of deed containing a condition,
    g.—To what time title relates,

h.—Deed of confirmation,
i.—Effect of delivery between parties.
25. Acceptance.
26. Delivery of deed as an escrow.
27. Recording.
28. Rights of parties between delivery and recording.
29. Acknowledgment.
30. It is a ministerial act.
31. Nature and effect of certificate.
32. Evidence to explain deed.
33. Correction of deed.
34. Description:
a.—Monuments control courses and distances,
b.—Kinds of monuments,
c.—Which kind is of highest value,
d.—Monuments that mark public lands,
e.—Monuments that mark a city lot.
35. Boundary by non-navigable stream.
36. Boundary by tidal navigable stream.
37. Boundary by non-tidal navigable stream.
38. Boundary by a lake.
39. Boundary by a highway.
40. Boundary by a private way.
41. Boundary by a park.
42. Quantity.
43. Reference to other deeds.
44. What passes.
45. Covenants:
a.—Number,
b.—Covenant of right to convey,
c.—Covenant of possession,

d.—Covenant against encumbrances,
e.—Covenants for quiet enjoyment and warranty,
f.—Special covenants,
g.—Implied covenants,
h.—Covenant does not protect purchaser from surety,
i.—Distinction between real and personal covenants,
j.—What covenants are personal, and what real,
k.—Tendency is to regard covenants as real,
l.—What particular covenants run with the land,
m.—Covenants concerning encumbrances,
n.—Covenants concerning quiet enjoyment,
o.—Covenants concerning right to convey,
p.—Damage for breaking a covenant.

1. One of the most common ways of acquiring land is by purchase. After making an oral bargain, the preparation and delivery of the deed is often delayed for several days, or a longer period. If there is no written memorandum of the bargain it is possible for either party to decline to fulfil his part of the agreement, and the other is powerless to enforce it. Morally, of course, this is wrong; but the law can do nothing unless the oral bargain was reduced to some kind of writing.

2. What must this writing contain? By a statute, essentially a copy of an English one, the writing must describe the land sufficiently to identify it; and must be signed by the person whom the other seeks to hold.[1] A

[1] For a more complete description of the statute see Vol. III., Chap. II., Section 2, subdivision 5.

better form of writing is signed by both parties, and then each can hold the other. They can sign with a lead pencil; even a stamped signature will suffice. An agent can sign for his principal. The writing need not express the amount or consideration that is to be paid for the land. A letter or series of letters from which the terms of a contract can be collected will satisfy the law.

3. Notwithstanding this statute, there are cases in which an oral bargain can be enforced. This may seem to be an overthrow of the statute itself. When parties have actually made an agreement to convey, and the vendor or seller has actually transferred the possession to the vendee, this is such evidence of a purchase or transfer that the courts will recognise the transaction and compel its full performance. If the agreement were not carried out by the vendor, there would be manifest fraud, and the vendee would be a trespasser. In such cases the courts compel the vendor to execute his promise and to give a deed to the other party to whom he has sold his land. Possession by the purchaser is always an indispensable element in such a legal proceeding.

To this rule there is one exception. Between a landlord and a tenant possession would be no evidence of a contract of sale, because the tenant is occupying under a lease.

4. The payment of purchase money is not sufficient proof of an agreement to sustain an action for compelling the execution of the contract. Once the law was otherwise; courts acted on such evidence and compelled the other party to perform his agreement. Experience

proved that this was a dangerous practice. Sometimes a fraud was committed by maintaining that money was given in part payment for the land, when, in truth, it was given for something else. So the courts finally abandoned this ground; therefore, when money is now paid, instead of compelling the vendor to fulfil his promise by giving a deed, he is required to refund the money.

5. It is a maxim of the law that the title to lands can be acquired or lost only by the laws of the state where they are located. The rule has been recently thus expressed: "No man has any vested right to dispose of any property, by whatever title he holds, in any other way than that by which the law prescribes."

6. In conveying land by one individual to another several kinds of deeds are in use:

(*a*) First may be mentioned a release or quit-claim deed, whereby the grantor or seller conveys or parts with whatever interest he may have in the land conveyed. This deed is signed only by the grantor, and becomes effective by delivery to, and acceptance by, the purchaser.

(*b*) The second kind of deed is known as an indenture. This is signed by all the parties. In many cases copies are made corresponding with the number of parties or individuals signing the instrument.

(*c*) Thirdly may be mentioned a deed of warranty, which may be in form like a quit-claim deed, or a deed of indenture with additional stipulations, called covenants, that are of the highest importance. These covenants give the deed a higher character than that of a release or quit-claim; and for that reason it is generally used

in conveying real estate in nearly every state of the Union.

(*d*) In conveying an interest in land for a short period the writing is called a lease, though it is also a deed, but differing in many ways from those above mentioned.

7. A deed must be written, so it is said, on parchment or paper; this is not strictly true, for, if one were written on stone, as were the laws of Moses, it would doubtless answer the law. Nor does the law require accuracy or precision in the use of words, or observance of grammatical rules. Any writing from which the intention of the parties can be clearly gathered is sufficient by the modern law.

8. It is a fundamental principle that the writing must be completed before delivery, and that additions, alterations, erasures, or interlineations must be made before the delivery of the deed. If made afterward they either avoid the instrument, or are of no effect. Says Washburn: "If the contract thereby evidenced is an executory one, any material alteration made by the holder or a stranger will avoid it, unless done by consent of the maker, or without the knowledge and assent of the holder." [1]

9. (*a*) A different rule applies to unimportant alterations. Thus, a lessee, after the lessor's death, altered the words "E Street" to "W Street"; this was not a material alteration, because other parts of the lease showed that the original should have been "W Street." We are now going on dangerous ground. Such altera-

[1] Washburn on Real Property, § 2,094, p. 220 (6th Edition).

tions will stand only when they are not material, or clearly appear from other parts of the instrument to be its true purpose or design. Thus, a mortgagee who, without the other party's knowledge, increases the amount of the consideration, thereby invalidates the mortgage. A grantee who admits an alteration of his deed by himself, but with the grantor's consent, must prove that such consent was given.

(*b*) What is the legal presumption concerning the time of making them—before or after the delivery of the writing? Different rules have been declared. Perhaps the Missouri rule is as rational as any other that may be applied. The law will presume that the alteration was made before, or at least contemporaneously with, the signing of the writing, unless peculiar circumstances of suspicion are evident upon the face, and even then the whole question is one for the jury to settle upon the facts what and where and with what intention the alteration was made.

(*c*) The safe practice is, in all cases after making the erasure or alteration, to note it in some way on the writing itself, showing that it was made before its delivery.[1] By every good conveyancer such a clause is added.[2]

10. The loss of a deed after its delivery does not destroy the title of the grantee. A court of equity will establish

[1] Washburn, § 2,097, p. 223.

[2] Devlin says: "Where there has been a material alteration in a deed, the deed to the extent of such alteration has become a new deed, and the alteration may be of such a character as entirely to change the original deed. It should, therefore, to give effect to the alteration, be redelivered, and, if it has been acknowledged before alteration, should be again acknowledged." § 462a, Vol. I., p. 593.

the possession of a party who claims title under a lost deed, or grant such relief as the circumstances of the case may require. Again, in such a case should the purchaser fail to prove his title, but should prove the loss of his deed and the payment of the money, he may recover it, or, if the title of a part should fail, he can recover a part of the money he has paid.[1]

11. Not every person is legally capable of making a deed. Of these, minors may be mentioned first. They cannot make a conveyance of real estate beyond attack or questioning. The courts differ widely concerning the worth of such a conveyance.

(*a*) Some affirm that such a deed is voidable; in other words, the minor, after attaining his majority, can set it aside or declare he will not be bound thereby, as he pleases. Other courts declare that such a deed is void absolutely; is of no more account than a piece of waste paper. The general tendency of the courts is toward the doctrine of voidability; wherever this prevails the transaction, after the minor becomes of age, may endure.

(*b*) In these states, the question arising in every case, after a minor has attained his majority, is, has he taken any action to show whether he has avoided or confirmed his deed? Whether he has done so or not is a question of ordinary fact. Time, often, is very important in answering this question. If, for example, a minor who has given a deed takes no action to avoid or set it aside months after attaining his majority it is held that he approves or ratifies his action. Forgetfulness to act will not suffice.

[1] 94, Am. St. Rep., 469.

But, if he were sick at the time of attaining his majority, the law lengthens the period for acting.

(*c*) Many illustrations might be given of the ratification of deeds by minors. In one of them, in which a tenant had occupied a house for six years after the lessor became of age, the courts held that he had thereby ratified the lease. In another case acquiescence for four years was deemed sufficient.

In Vermont a minor who wishes to avoid his deed made in infancy must do so within reasonable time after coming of age. Likewise, in Connecticut, neglect to disaffirm the deed within a reasonable time after attaining majority is sufficient evidence of ratification. In Missouri a grantor, after attaining his majority, expressed himself satisfied with his former act, and promised to execute a confirmatory deed, but ten months afterward died before doing so; this was a ratification. In Massachusetts the courts say any distinctive act or recognition is competent evidence of a ratification.

12. The deeds of insane people fall nearly in the same category as those of minors. They are not capable of giving deeds absolutely binding on them. It is sometimes declared that they cannot receive a deed for the same reason.

13. Executors and administrators are, to some extent, disqualified from acting. As they act in a representative capacity, they can go only so far as the law prescribes. Trustees, technically so called, can act only in a limited way, and if they exceed their limitations are either bound personally or not at all.

14. Married women are also in this category. For-

merly, their right to act was extremely limited; by statute, in all the states, larger rights have been given to them to convey their property Nevertheless, as we shall hereafter learn, they have not as complete rights as unmarried women. Again, while neither husband nor wife can, at common law, convey directly to each other, equity will sustain an honest transaction not affecting creditors. But the better and more common method is to make the conveyance through the medium of a third person.

In many states a married woman can now convey her own property without joinder of her husband's written consent expressed in the deed, except so far as this may be necessary to defeat his right as tenant by the curtesy.[1] This would seem to be essentially the same limitation as the law attaches to his right to convey his real estate, for, in many states, he cannot do this without her written consent. In other words, he cannot cut off her right of dower without her voluntary action. As the states have prescribed by statute the rights of married woman to make contracts, including her authority to part with her lands, nothing further need be said on the subject in this place.

Formerly, she could not appoint an attorney to convey her land for her. By the modern rule, wherever she has the right to sell her land, independently of her husband, she can exercise this authority by an attorney. There has been a great deal of learning expended on this subject, but, in one of the federal cases, Justice Peckham said there was no particular reason, when a wife can convey directly, why she cannot authorise another to do the

[1] See Chap. IV., Section 2, for a description of tenancy by curtesy.

act for her. "The reasoning which would prevent it is, as we think, too technical, fragile, and refined for constant use." [2]

15. The deed of one who is induced by the fraud of a grantee is not void but voidable. The grantor may rescind the contract within a reasonable time after discovering the fraud, repay the consideration, and demand the recovery of his land.

16. In making a deed the names of the grantor and the grantee should appear; sometimes mistakes are made, for conveyances are often written by persons who have a very imperfect knowledge of the mode of preparing and executing such writings. The law looks at the substance of things rather than at technical forms; consequently, a deed in which the name Edward appears in the earlier part, but which is signed Edmund, is valid. Another principle, quite in harmony with this, has been adopted: one who accepts a deed in which his name is not correctly stated or spelled is deemed to have adopted that name for the purpose of acquiring and holding the title to the property.

The omission of a person's middle name will not vitiate a deed, for the law requires only one Christian name. Since the time of William the Conqueror, a full name consists of one Christian name, or given name, and one surname or patronymic, the two, using the Christian name first and the surname, constituting the legal name of a person. Anyone may have as many middle names or initials as are given to him, or as he chooses to take. They do not affect his legal name, and

[2] Williams v. Paine, 169 U. S., 67.

may, or may not, be inserted in a deed without affecting its legal validity. For the same reason a mistake in the middle initial of the name is not material in legal proceedings, nor is a similar omission in the acknowledgment of a deed which contains the letter in the body of the deed itself.

To call a person senior instead of junior, as intended, or vice versa, does not affect the validity of a deed. Again, to describe a person by the character given to him by general repute will suffice, even though it is not the literal truth. Likewise, to call a man by the name he is usually called, though this differ from his baptismal name. But a deed to, or by, a person by a surname only, without something to show who was intended, would be void.

17. Property must, at all times, have an owner; it is impossible for one person to part with his ownership unless there is another person to take it from him. Consequently, a deed to a person having no existence passes no title from the grantor.

(*a*) A deed, therefore, to a fictitious person is void. But a distinction exists between a fictitious person and a person existing with a fictitious name. In the former case the deed is worthless; in the latter, if the true person can be ascertained, the title to him will pass.

(*b*) A deed to an estate of a named person is a nullity, for it does not name a grantee who is in being and capable of taking the estate conveyed. And a deed conveying property to the children of a named person will be effective in conveying to children who were living at the time of executing the deed, but will not include children

born afterward. Furthermore, a deed to children who should be alive at a certain date would be absolutely void.

(*c*) To sustain an immediate estate there must be an existing person. Indeed, it would be a contradiction in terms to attempt to grant such an estate to a person not in existence.

(*d*) But an estate in remainder, or a future estate, may be granted to a person who is not then living. For example, an estate to A and his children or his heirs, though there be no children or heirs in existence at the time of making the conveyance, is valid. The unborn grantee must appear during the continuance of the present or intermediate estate, or at the moment of its termination, otherwise there is no one in existence to whom the remainder can descend, and it would be void.

(*e*) Sometimes a future estate is created through the medium of a trustee. The present immediate estate is given to the trustee, who is to hold it for a given period, or until other persons appear to whom the future estate is to go. In these cases the trustee is said to hold the legal estate, and the beneficiary the equitable. This mode of conveying property has played a prominent part in both American and English law, and will be fully considered hereafter.

(*f*) A deed to a corporation not yet organised, and consequently not actually existing, is a nullity, for there is not a grantee capable of taking it. This is the general rule, though, in some states, a deed to an unincorporated company, which is to come into being at an early date, may be valid. Cases of this kind occasionally happen in this country; in England they are frequent.

18. It is a universal practice in all cases to affix a seal to a conveyance of land, and even to all leases.

(*a*) It is of no importance in affixing the seal whether the grantor or grantee, attorney, or stranger, were present; the essential thing is to do this before the delivery of the writing.

(*b*) Any number of grantors may use the same seal. A deed prepared for several to execute, to which only a part of them append seals to their names, will be valid, provided it be properly delivered by the signers. Of course, it will not bind those who do not sign. If it is signed by all and asserts that the grantors have affixed their seals, and there are not as many seals as names, the law presumes that some of the signers have adopted the seals of the others. This is one of those numerous presumptions which play such an important, and generally useful, part in the law.

(*c*) A corporation need not use its corporate seal in executing a deed; the use of any seal will suffice. This is not the law everywhere; the federal courts, especially, hold that a corporation must use its corporate seal and affix it by competent authority. Furthermore, a corporate seal may be impeached by showing that it was affixed by a person without authority.

(*d*) What is a seal, to some extent is an open question. The true significance of one has largely passed away. Formerly, seals were used by the great land-owners when conveying land, as the highest proof of their action, because generally they were unable to write their names. As every person had a seal of his own, the mark was quite as distinctive as a written signature. Since most

persons now know how to write their names, a seal has less significance. Consequently, either by statute or common law, the use of L. S. enclosed in brackets, thus [L. S.], is often as effective as a seal of wax or a wafer.

19. In nearly all states the names of the witnesses who have attested its execution are subscribed to a deed. By the common law an attestation was not required to give validity to a deed, nor is this required even by statute in all the states. It is, though, a general practice. In many states, by statutory requirement, every deed must have one or two subscribing witnesses; without them the deed is invalid. Thus, in Michigan, where two witnesses are required, a deed attested by only one was declared to be not a legal conveyance.

A witness need not see a party to a deed write his name. It is enough if he asks the witness to subscribe to the attestation clause, and the latter complies in the signer's presence. Witnesses to deeds cannot, like witnesses to the wills of testators, express opinions concerning the capacity of the signers; they can merely testify to the fact of signing as a witness, nothing more.

20. A deed may be executed by a grantor, or by his agent or attorney. When executing a deed in the latter manner, an attorney must have ample authority of a character as high as that of the deed itself. Generally, he is given authority by a sealed writing, called a power of attorney, and this, also, is recorded like the deed he executes. By thus recording the authority of the agent to act, the record of the transaction is made complete.

The authority of corporations to execute deeds and

hold real estate depends on their charters and the general statutes of the state.

21. Formerly, the courts were exceedingly strict in construing the precise form of signing. Thus, a deed signed by a man as attorney or agent, without stating the name of the principal, was regarded as the deed of the agent or attorney, and the additional word, *attorney* or *agent*, was rejected as surplusage. The books are full of deeds condemned by reason of the attorney's failure to follow the precise legal form. Without reviewing these, the matter may be cut short by saying that the modern courts regard the intention of the signer. When therefore the fact clearly appears that a person is acting as agent or attorney for another, and not for himself, his intention will be given to the writing. Had this broad and rational principle been adopted earlier many a deed would have been construed very differently.

As towns, cities, and other public bodies must act by attorney, the deeds signed by their attorneys are regarded in all cases as the acts of the bodies they represent.

22. It is not necessary, under ordinary circumstances, to read a deed to the grantor, and, as he is presumed to know its contents, he cannot avoid it on the ground of ignorance. "A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practised upon the grantor in procuring his signature and seal." [1] A different rule, though, must be applied to a person who cannot read, or who is blind or ignorant. He can insist on having the deed read to him, and, if this is not done, or if it is read

[1] 3 Washburn, § 2141. See Truman v. Lore, 14 Ohio St., 144, 155.

falsely, or its contents are falsely stated, it may be set aside.

23. A deed is dated, and this is presumed to be the time of the execution and delivery. In indentures the date is usually at the beginning; in single deeds, at the end. Notwithstanding this presumption, proof may be given to show that the date inserted was not the true date of its delivery. Again, it is said that a date is immaterial, and, consequently, a deed would not be affected if the date were impossible, like the 30th of February.

24. Delivery is essential to render a deed valid; but, like so many other apparently simple matters in the law, it is not always easy to determine what is a delivery.

To effect a delivery two things are needful. The grantor must give up control of the deed, and the grantee must actually accept it, and thereby accept the estate therein conveyed. Consequently, to render this action valid, both the grantor and the grantee must at that time be capable of thus acting. The delivery of a deed after the grantor's death is not effective.[1]

(*a*) So long as the grantor retains the legal control of the deed, the title does not pass. Though a deed may be completed in every respect, except actual delivery, the transaction is not effective until this is done, and in good faith. Therefore, were a deed taken out of a

[1] "A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. There is no particular form necessary, but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each particular transaction." Lorigan, J., Kenniff v. Caulfield, 14 Cal, 40.

drawer by a thief and delivered to the grantee named therein, no title would pass to him from the grantor.

(*b*) Again, the instrument must be complete. When, therefore, it is given to another for the purpose of ascertaining whether it is satisfactory or not, or of doing something in connection therewith—to make an examination of the title, for example—this is preliminary to final action, and has no effect in the way of a final delivery of the instrument.

(*c*) A delivery may be actual—that is, by doing something and saying nothing; or, it may be verbal by saying something and doing nothing; or, it may be by both speech and action. As Washburn says, "there must be an intention to give effect to the deed. If the deed is lying on a table in the presence of the parties, and the grantor tells the grantee to take it, and this is done, the delivery is complete. But should one, to whom a deed is made, get possession without the grantor's intention, it would not avail him anything, nor transfer the title."

(*d*) Ordinarily, nothing further is required to constitute a delivery of a deed by a corporation than to put its seal thereon by the consent of the organisation, unless its execution is by an attorney. When thus executed, it does not become the corporation's deed until a formal delivery. A delivery of a deed to an authorised agent of a corporation is a delivery to the corporation itself.

(*e*) A deed may be delivered to a grantee or to a stranger unknown to the person for whose benefit it is made when this is the maker's intention. In such a case the delivery is effective the moment the grantee's assent

is given, even though the grantor, during the interval, may have died. In one case a soldier, just before entering service, made a conveyance to his wife, which he left with other papers in her possession, though she had no knowledge of it. Discovering the deed after his death, the court held that this was a sufficient delivery.

(*f*) A deed that is delivered before fulfilling the condition that may be attached thereto will have no effect. The act is a manifest wrong to the grantor and is not binding on him. Whether this be done through either fraud or mistake, the effect is the same; the land is not transferred. The books liken such a transfer to that of a deed which the grantee has stolen, whereby no title is gained, though, in form, the instrument may be complete.

(*g*) After the deed has been delivered the grantee's title often relates back to the time of putting the deed into the possession of the third party. The title does not always run backward in this manner. Whether the deed has a retroactive effect or not depends rather on the intention of the parties.

(*h*) A deed of confirmation may make a voidable estate good. On the other hand, the deed does not strengthen the estate that is absolutely void.

(*i*) Of course, the delivery of a deed is valid between the parties themselves, and all others who have knowledge of the transaction, or have any reason to suppose that the conveyance has been made. The occasions on which a land-owner attempts to practise a fraud like this are happily rare, yet they are frequent enough to

require a statement of the principles of law that apply when they occur.

What does happen, frequently, is the attachment of the land by creditors of the grantor. The law favours the grantee in all cases of this kind, and the general rule is, if the sale has been made in good faith, although the grantee has neglected to put his deed on record within the time prescribed by law, nevertheless, he retains his ownership as perfectly as if no creditor had attempted to take away his land from him.

25. The grantee's acceptance or assent must also be in the grantor's lifetime, unless the act of delivery is one of a continuing nature, such as leaving a deed on deposit to be accepted by the grantee at his election. Thus, a father made a deed to his son and left it in the registrar's office to be recorded. But as the latter had no knowledge of it, he could not have assented to the conveyance. The deed, therefore, never passed any title to the land to the son, and consequently his heirs had no title thereto.

The law presumes that a deed found in the grantee's possession has been delivered and accepted. This is a presumption and nothing more, though the burden of proof is on the attacking party to show the fact to be otherwise.

When a deed is delivered to a person who is under legal disability—a minor or insane person, for example—nothing need be done on his part to indicate its acceptance. If the grant is beneficial to him the law will regard the delivery as an acceptance.

26. Sometimes a deed is delivered to a person as an escrow. The object of doing this is to require the

grantee to perform some condition before giving him the writing. For example, a deed may be delivered to another to keep until the grantee is ready to pay the consideration. A deed thus delivered, until the failure of the condition, cannot be recalled; it is beyond the maker's control, otherwise it would not partake of this character.

Whether a deed is an escrow or not depends largely on the intention of the parties. The guiding principle is whether the grantor has entirely parted with his control over the instrument. Whenever he has then the delivery is complete. In all cases, to possess this quality of an escrow, it must be completely executed in all respects except the formal delivery to the grantee. When, therefore, a deed is placed in the hands of a third person, as an agent, servant, friend, or bailee of the grantor for safe keeping only, and not for delivery to the grantee, the transfer does not constitute a delivery, and the deed fails for lack of complete execution.

Finally, when a deed is thus given to a third person for delivery to another, it is proper that some words should be added to indicate this intention of the parties. If none are added this intention should be expressed in a formal manner.

To a composition deed a somewhat different principle applies. If this is delivered to a creditor on condition that it shall be void unless all the creditors sign, it is an escrow, without any binding obligation until all the creditors comply with the terms.

The delivery of a deed as an escrow has no effect until the performance of the condition. Therefore, a creditor of the grantor who should levy on the land in order to

satisfy a debt of some kind would hold it by virtue of his levy in preference to the grantee in the deed. Again, the grantee would take subject to any grant made by the grantor after the delivery in escrow and before the happening of the condition. As an example, a grant of right of way over the grantor's land to a railroad company. The grant would be effective to convey the land, notwithstanding the execution and delivery of the deed to a third party to be kept by him until the fulfilment of the condition by the grantee.

27. In this country the practice is very general to record all conveyances of land, in public offices established for that purpose. This practice has prevailed from the earliest times, and it has wrought wonders in the way of simplifying the titles to real estate and in rendering their transfer easy and secure. Anyone can readily understand that, where no system of recording prevails, and a title is simply oral or written on a piece of paper which may be easily lost, possession of the property purchased is essential to render the owner secure. With the progress of civilisation and the perfecting of a system for recording deeds, the possession of property is becoming less essential as a security to the owner. In other language, by virtue of our system of recording deeds, it is safe enough to buy property, although the buyer may have never seen it, and has no intention of taking formal possession. Indeed, he is just as secure as he would be by going on the land and making a formal entry, as was done in the olden time.

The recording of a deed is not conclusive proof of its delivery and acceptance, even though the instrument is

taken to the recorder's office for record by the grantee or his agent. Cases have happened in which an instrument has been delivered, recorded, and afterward taken away from the recorder's office by the grantor, without any knowledge whatever by the grantee of the transaction. In such cases, as there is no delivery, there can be no acceptance.

Generally speaking, the recording of a deed is a notice to all the world of the transaction; but in fact, this is not always so, even between a grantor and grantee, as there is no particular reason why an unknown grantee should visit the recorder's office for the purpose of finding out whether anyone has made a grant to him or not.

28. What are the rights of parties between the time of delivering and recording a deed? Surely there ought to be no division of legal opinion on such an important subject. As the object of recording is to give notice of the transaction to all the world, so any transfer made between the time of delivery and recording ought not to affect any party who is acting in good faith. Suppose a grantor should make a second conveyance between the time of making the first and its delivery for record in the public office. The purchaser who buys in good faith, and pays the price therefor, ought not to suffer by his transaction; but rather the first grantee, because it is his unquestioned duty, under ordinary circumstances, to leave his deed for record as soon as possible after receiving it.

In many states though, by statute, purchasers have three months or even longer period to record their deeds during which they are fully protected from the conse-

quences of any action by the vendor. Of course "between the parties to the deed, or the heirs or devisees of the grantor, and the grantee and those claiming under him, the validity of the deed is not affected by the want of record; and the same is true as to all purchasers who may take a subsequent deed, knowing of the existence of a prior one." [1]

29. In some states the law requires a deed to be acknowledged in order to pass the title. In others a deed may convey a title as against the grantor and his heirs, even though it be not acknowledged. In these the recording of a deed is simply a notice of something which has already been done.

A principle of general application is, a deed must be acknowledged by the law of the state where the land lies. The certificate of acknowledgment must be a substantial compliance with the requirement of the law.

30. An acknowledgment is a ministerial, and not judicial, act; [2] consequently, an officer who thus serves, and is related to the party making the acknowledgment, is not disqualified by reason of his relationship. But an acknowledgment by an officer who is interested in the conveyance would not be legal. Furthermore, it must be done by an officer within the territorial limits of his appointment. A notary public of Pennsylvania could not acknowledge a deed in another state, or an officer having authority to act in a single county could not take an acknowledgment of a deed in another.

31. A certificate of an officer is not conclusive evidence

[1] 3 Washburn, § 2200, p. 291.
[2] Washburn, § 2194, p. 287.

of its truthfulness, as the law says it is prima facie evidence and nothing more. It is presumed to be correct, but may be set aside or impeached by proper evidence.

The courts strive to uphold an acknowledgment whenever this can be done with due regard to the statute prescribing the mode of making it; consequently, obvious clerical errors are not regarded, such as the misspelling of the grantor's name, and other apparent mistakes.

32. Oral or parol evidence may be admitted to explain words of art or technical terms used in a deed, which are not readily understood. But, in a deed containing everything needful for understanding the intention of the parties there is no room or occasion for introducing oral evidence.

33. Under some circumstances a deed may be corrected. The general rule is, it may be amended in all cases of accident, fraud or mistake. If the grantor is unwilling to make the proper correction, whereby it will conform to the intention of the parties, the grantee may apply to a court of equity for such a correction as will render the instrument a fair and honest expression of the true agreement.

34. Formerly, when land was of less value than at present, the description or boundary of land conveyed by deed was often very imperfect. With the denser settlement of the country, more care is taken in describing it. One of the rules of construction is that an imperfect description cannot be mended or controlled by oral evidence. For this reason, among others, the extremest care should be taken to define the premises with the utmost certainty. Another rule of construction is that a

deed should favour the grantee, but this is applied only when other rules fail to remove the doubt or ambiguity. It need hardly be added that the construction put on the deed should be reasonable.

(*a*) In construing a description monuments will control courses and distances. This is based on a sound principle. They are less likely to be destroyed, or be wrong, than courses or distances. In making ordinary surveys courses may vary by reason of local attraction of the compass; and errors in distance may be due to inequalities of the surface.

(*b*) There are two kinds of monuments—natural and artificial. Among the natural monuments are streams, ponds, lakes, shores, trees and highways, which are silent but effective informants. When lost or removed, or there is doubt which of two objects is the monument, oral evidence may be admitted to clear up the difficulty.

(*c*) The location of a monument is a question of fact for a jury. Again, it is asserted that natural monuments are of higher value than artificial ones, but this rule, perhaps, may be questioned, especially if the artificial monument has been prepared with great care and is of durable nature. Surely, a large stone that is put in a secure place, is a more secure boundary than a tree that may be blown down, or than a small, wayward stream whose course may be changed by a freshet. When a line is described as running from one monument to another, the law always contemplates a straight line. Furthermore, a line that is described as running from a given point to a natural object, like a highway or a stream, unless the course or length of the line is given,

must be the shortest one that can be drawn from the point to the object.

(*d*) In marking the public lands of the Western territories, the statutes have prescribed some rules that are imperative. The surveys often call for artificial monuments to designate the corners of the tract. These monuments control the courses and distances. To this rule two exceptions may be noted: first, in a deed that calls for natural monuments; and second, in a description that refers to a township and section, one or more corners of which have been lost. In the first case the general rule concerning monuments controls the boundary, both the artificial monuments and the courses and distances, although maps and field-notes would indicate a different location. But when a natural and artificial monument cannot be ascertained by any proper evidence, then course and distance must cover the location of the boundary, and this rule prevails with respect to lost corners. Oral evidence is admitted to establish the location of monuments, and even hearsay evidence, and evidence of general reputation, may be admitted in such cases.

(*e*) Courses and distances of a small city lot play a more prominent part in determining the boundaries. The reason is that the courses and distances are ascertained with more care, are shorter and, therefore, it is possible to define them with greater accuracy than in the case of a farm or a very large tract. When walls, fences, and the like form monuments of some appreciable thickness, the boundary is always to the centre of the monument. In the cities especially land is

becoming so valuable as to make this point worthy of notice.

35. The boundary of land by a non-navigable stream is the centre, changing with its course. Again, one who owns both banks has a title to the land between them and may lawfully maintain a fence across the stream.[1]

It is not true, though, that the centre of a stream always forms the boundary line. If land is described as bounded on, or running along a river, the centre is the boundary. But the stream is excluded by bounding land on the bank, or shore, or by other words clearly indicating an intention to exclude the stream itself.

36. The boundary by a tidal navigable stream is the high-water mark. In Massachusetts and some other states, by statute, low-water mark forms the boundary of land located on navigable rivers and by the sea. In both cases a riparian owner has a right to erect and maintain wharves extending from his land, subject to public control. The same rule applies to him as applies to the owners of land bounded by the sea. The shore or beach is the property of the state.

The title to a navigable stream forming the boundary of a state passes to low-water mark, and the grantee can use the land between high- and low-water mark for his own private purpose, provided that his use does not interfere with the public rights of navigation, fishery and improvements.

37. The boundary by a non-tidal navigable stream is not so clearly determined. In some states, by statute, the lands over which navigable streams flow belongs to

[1] See Sec. 5, § 2.

the state, and the implication clearly is that the land of all other streams belongs to the adjacent owners, the line between them running in the centre. The lands within a state that makes no claim to them extend to the centre of the stream, subject, of course, to the public rights of navigation.

38. The boundary of a natural pond or lake is low-water mark; and the same rule applies to the boundary to a natural pond raised artificially. Nor will the conversion of a fresh-water pond into a salt pond by artificial means change the law concerning the rights of the land-owners. To an artificial pond a different rule applies, the boundary is through the centre.

The title to the bed of all lakes, ponds, and navigable rivers to the line of ordinary high-water mark within the boundaries of many states was vested in them on their admission into the Union. Their waters are thus forever preserved for the enjoyment of their citizens to the same extent that the public are entitled to enjoy tidal waters at the common law. Nor can anyone divert or transfer the public title to such lands, by grant or otherwise, to individuals or an association.

Again, the state title does not change by reason of the fact that the lakes and ponds are artificially filled so as to raise the land above the surface of the water.

39. The same rules of construction apply to land bounded by a highway as to that bounded by a non-navigable stream. If the words of description are "by or along a highway," and the like, the land extends to the thread or centre of the way, and nothing short of clearly expressive words will work an exclusion. Even

some descriptions of land "by the side" of a highway have not thus operated, for the reason that the scrivener evidently intended to convey to the centre. The cases of exclusion, therefore, are very rare. One reason seems to be almost conclusive; namely, that the grantor would have no use for the land used as the highway unless he retained the land on the opposite side, or unless it is clearly shown that there was something to be gained by retaining it as against the grantee—a mine, for example.

The adjoining owners of land bounded by a highway which is subsequently abandoned, can extend their lines to the centre. A different rule may be applied if one of the adjoining proprietors can prove that he had a right to more than half.

Again, the covenants in a deed of land bounded by a street or highway do not relate to the land over which the public exercises public rights. In other words, the covenants pertain simply to the land enclosed, and not to the soil in which the public exercises its rights of passage.

40. To land bounded by a private way no right of way is acquired by the grantee. If the grantor does not own the land no covenant will be implied from a reference to a deed for the purpose of description.

41. To land bounded by a park a somewhat different principle applies. The grantee takes only to the interior line of the park, and not to the centre.

42. The quantity of land conveyed is sometimes given, more often the exact quantity is unknown; in no case is the quantity permitted to control the courses, distances, or monuments. Generally, deeds contain a clause,

"more or less," in order to save the grantor from liability on his covenants with respect to the quantity. By inserting this clause no return of any part of the purchase money can be demanded, should there be a deficiency in the quantity, unless the statement is infected with fraud.

43. Sometimes, instead of giving a description of the land, the deed refers to other deeds containing a description. When this is done the effect is similar to an insertion of the description in the subsequent deed. In like manner plans or maps of monuments, courses and distances, to which reference is made, become a part of the conveyance.

44. Whatever belongs to the land granted will pass therewith, although not specially mentioned: houses, window-blinds, doors, mines, and the like.[2] Whatever is a fixture goes with the premises. The law regards the grantor's right to remove things far more narrowly than those of the tenant, and for a sound reason. It is reasonable to suppose that, as a tenant's occupancy is only temporary, he does not intend to benefit his landlord by affixing things to the soil for the lessor's enjoyment after the cessation of the tenancy. On the other hand, a grantor who is the owner puts everything, so the law presumes, on the land—houses, improvements of all kinds—with a view to permanency, and not of removal. Rarely, indeed, can things which form naturally a part of the realty, and were annexed for its more perfect enjoyment be removed by the vendor after the sale. In like manner buildings that he has erected, whatever

[2] See Chap. VI., §§ 1, 2.

may be the mode of their construction, are a part of the realty and pass therewith to the purchaser.

An exception or reservation may be made in a deed, which, of course, has the effect of retaining the title to whatever is excepted or reserved. If repugnant to the grant, the exception or reservation is void.

45. Another important part of a deed consists of the covenants of title, as they are called. These stipulations or agreements are of great practical importance, yet are very imperfectly understood.

(*a*) There are five of these, though not all are found in modern conveyances: covenants of seisin, or possession; the right to convey; against encumbrances; for quiet enjoyment; and warranty. In many states only the last covenant is generally employed. In the older states all of them are often found. Like many other legal principles, they run into one another and are not clearly separated, and, for that reason, will be considered under less than five heads.

(*b*) The right to convey is the right to convey the title to the land itself at the time of the sale. But, if he does not own the legal title, or is not in possession of the land itself, the covenant is at once broken, and the grantee can bring an action against him for conveying what he did not own.

(*c*) The covenant of possession is defined to be an assurance that the grantor has both in quantity and quality the various estates which he professes to convey; therefore, any outstanding right or title which diminishes the quality or quantity will be a breach of the covenant. It is broken if the estate is of less duration than that

mentioned, or if the quantity is less than that described. The covenant is broken also when the land conveyed has fences, buildings or other erections belonging to other persons, unless there is an exception made to them in the deed. But the existence of an easement—for example, a highway or a railroad—is not a breach of the covenant, nor an outstanding judgment or right of dower, for the reason that the grantee is presumed to know of their existence.

(*d*) The covenant against encumbrances is intended to provide security against the claims of third persons. The most common form of encumbrance is a mortgage; but there are others: a right of dower, a judgment lien, taxes, an outstanding lease. There may be easements on the land, railroads, private rights of way, rights to watercourses, the right to cut trees, maintain dams and aqueducts; though in some states this rule is not so sweeping. "In Pennsylvania, Kentucky, Wisconsin, Iowa, and Virginia a public highway in use is not deemed an encumbrance in the conveyance of lands. And such is the tendency of the opinion of the courts of New York. But in Indiana, Alabama, Vermont, Massachusetts, Connecticut, New Hampshire, and Maine a public highway is an encumbrance, and constitutes a breach of the covenants in a deed of the land over which it exists." [1]

(*e*) The covenant for quiet enjoyment is in common use in England, but, although inserted in the deed in America, requires little construction, as it is of essentially the same nature as the covenant of warranty. This

[1] 3 Washburn, § 2385, p. 441.

covenant is the most general of all. In the Western and Southern states, especially, it is the one most generally used.

This is a personal obligation binding the warrantor and his personal representatives, and also his heirs and devisees, when they are expressly mentioned. Even then their liability is not indefinite, but only to the extent of the assets or property received by them from the warrantor. As a personal covenant or agreement, its virtue is gone after a period fixed by statute, and differing considerably in the several states. When it is broken the covenantee is entitled to an action against the covenantor.[1]

(*f*) Besides these covenants, deeds sometimes contain special covenants of warranty against claims, past transactions, special damages, defects, etc. A not uncommon covenant is that the grantor will not erect a building on an adjoining lot, or not within a specified distance from the line, etc. The mere mention of these will suffice, because the operation of them is essentially the same as in other cases. They are special in every sense, and how far they bind depends entirely on their construction.

(*g*) Deeds may contain implied covenants, but the law seems to be opposed to raising these when there are express ones. Nevertheless, both express and implied covenants that are not inconsistent with each other may exist; when they do the implied covenants fail so far as they are opposed to the express ones.

(*h*) A covenant does not protect the vendee or pur-

[1] Tiedeman on Real Property, § 856, p. 699.

chaser from suits, or save him harmless from the expense of them. Thus, suppose a person claims a private right of way over the land of the purchaser, and, having been refused the right to exercise it, brings his action to enforce his right. Though failing in his suit, nevertheless the purchaser has incurred no little vexation of spirit and loss of money in defending his title. Yet he cannot call on his grantor to reimburse him. The grantor would reply, "I warranted your title to be good, and the suit has proved the warrant to be good. I am sorry that anyone should have been so foolish as to set up a false claim thereon and attempt to enforce it; but I did not promise that everybody would let you alone, for, though not knowing much, I do know that fools are still numerous."

(*i*) Besides the covenants mentioned, there is another division into personal and real, and it is important to understand the distinction between them. Personal covenants exist simply between the parties to a deed; real covenants run with the land—in other words, they bind the covenantor, the covenantee, and their heirs and assigns.

Thus, if a covenant is personal between A and B and the covenantee, B, sells the land to C, who finds a flaw in the title, he cannot sue A, because the warrant or covenant was between A and B, and not between A and C. A covenant, therefore, is said to he personal when it binds only the original parties to a deed. When does this happen?

Suppose A covenants and agrees to bind himself, his heirs and his assigns by his deed. The covenantee, of

course, thinks that A's heirs and assigns are bound, but this is not always so. The language says so, but the law declares that the covenantor did not mean what he says. What, then, did he mean?

The law declares that if the covenantor asserted in his deed that he was the owner and possessor of the land sold, when in fact he was not, this is a personal covenant and does not run with the land, and does not, therefore, bind A's heirs. The reason for this rule is extremely artificial and narrow. A covenant never continues to run with land after it is broken. As A was not the owner of the land at the time of the sale, his covenant was broken instantly, and so, notwithstanding the words he used in the deed, it did not run with the land and it bound only himself.

What remedy, then, if any, has the covenantee? He can sue A on his personal covenant to recover for the damage, if he is alive; if he is dead, the covenantee can sue A's representatives—that is, his executor or administrator if he still possess any legal capacity, but he cannot sue A's heirs; they escape.

(*j*) Having shown the importance of the distinction between personal and real covenants, the next inquiry is, what covenants or agreements are personal, and what are real? Instead of giving plain practical answers to this question, the law is sadly confused, nor do the courts manifest much disposition to aid individuals through the thicket. This is one of the subjects that ought to be lighted up by a statute.

First, it is an essential element of a real covenant that it has for its object something annexed to, or inherent in,

the land. The first criterion for determining whether a given covenant runs with the land, or not, is its nature and purpose. When this is not decisive the intention of the parties as shown in their deed must determine the question.

Second, all covenants relating to the title of the land that are not broken on its transfer to the heir or assignee are real covenants.

Third, a covenant is said to run with the land whenever the liability to perform it, or the right to take advantage of it, passes to the assignee.

Fourth, to create a covenant running with the land, there must be a privity of estate, so the law says, between the parties. This is an old feudal phrase, which means that a mutual relationship must exist between the grantor and the grantee and his assignees to carry a covenant of warranty to subsequent grantees. Unless, therefore, there is such a mutuality or succession of interest, a covenant will not run with the land.

(*k*) There is a growing tendency to regard covenants relating to land or its use as running therewith, and they are frequently enforced against subsequent grantees who have notice, even though there is no privity of estate. Consequently, a covenant concerning the title or use of land may be enforced in equity regardless of the question whether the covenant is one that runs with the land itself. By this rule covenants are sustained and enforced against assignees who have a notice stipulating for the particular mode of improvement, occupancy, or use of land. Covenants relating to the mode of building, or of using water rights, or air and the like, are essentially

of this nature, because, through the stipulation contained in the deeds, all parties have notice of their existence.

(*l*) With these general principles before us we may pass to the consideration of the question, what particular covenants run with the land. The books contain a multitude of answers, but they are at hopeless variance. Generally, covenants that relate to buildings and improvements are of this nature. A covenant, for example, to erect a smelting mill or to set back a building from the street, or to build a new chimney, and the like, runs with the land. So are covenants not to build on adjoining land, or to open a street of a certain width, to keep up a dam, flume, levee, pier, bulkhead, gate, and the like. Also, covenants creating easements, to insure buildings and to use the money for rebuilding in case of loss. In like manner covenants to erect and maintain fences, to pay mortgage debts, to save the expense of building a party wall, to pay rent, to make repairs, and, in many cases, covenants concerning the use of the property. Also, covenants to pay taxes and assessments, and to regulate and restrict the use of land. Besides these may be mentioned covenants to supply or furnish water. Of late years the courts have not had much difficulty in determining that such covenants are real and run with the land.

(*m*) There are other covenants, concerning which the courts have had the greatest difficulty in determining their character. First, the most important among them is the covenant respecting encumbrances. If one exists at all, it exists at the time of delivering the deed, and therefore it is broken immediately as soon as the deed is

delivered. Consequently, many courts have held that, as the covenant is immediately broken, it comes to an end and cannot run with the land. This view is strenuously denied by other courts, and thus they are hopelessly divided.

(*n*) In like manner the courts are hopelessly divided over the important covenant relating to the quiet enjoyment of land. This is said to be, if broken at all, broken on the delivery of the deed, and, therefore, does not run with the land. Nevertheless, other courts of equal authority maintain the opposite rule.

(*o*) Lastly may be mentioned covenants pertaining to the right to convey, which are broken immediately on execution of the deed, if at all. The courts are more harmonious in declaring these to be merely personal, and, therefore, not running with the land.

(*p*) When such an action has been brought what damages can be recovered? If the grantor acquires a paramount title before his grantee has been evicted by the adverse holder, the grantee can recover only nominal damages, for his title is rendered complete by the operation of the rule of estoppel.[1] If he has been evicted before the grantor has acquired a perfect title, he is entitled to recover all the damages he has sustained.

§ 2. Acquisition of Land by Descent

1. Meaning of heir.
2. When title comes into existence.

[1] Sec. 7.

3. Heir at law is only one who becomes owner without consent.
4. Degrees of relationship.
5. Rules of descent.
6. Ancestral estates.
7. Posthumous children.
8. Illegitimate children.
9. Law of what place applies.
10. Aliens.
11. The land may be taken from heir to pay ancestor's debts.
12. Claims or incomplete interests pass by descent.
13. Deductions for advancements.

1. An absolute, or lesser, estate or interest in land is acquired by the land-owner's death without disposing by will of his estate (if it be heritable); for, when this happens, the law disposes of his land to his heir or heirs. The term "heir," as thus used, is always a legal term, meaning the person or persons who are entitled to the inheritance.

2. Though the title comes into existence by the death of the owner or ancestor, by popular phrase persons are sometimes called heirs while the ancestor is living, and are known as heirs apparent and heirs presumptive. By an heir presumptive is meant a person, who, should the ancestor die, would be his heir. For example, in England a daughter, who is an only child, would be an heir presumptive; afterward, if the ancestor had a son, this presumption would cease. An heir apparent is one who, should he survive, is certain to be the heir of an ancestor.

3. The heir at law is the only person who becomes the owner of land by law without his own act or assent. On him the law casts the title, without regard to his desire, nor can he disclaim it if he would. Of course, he can part with the title afterward, but the title itself, by operation of law, vests or inheres in him. He is entitled to the rent of lands thus coming to him until they are sold for the payment of debts, even though the ancestors should die insolvent. On one occasion an heir was entitled to damages from building a railroad across the land of an ancestor after his death, although the land was subsequently sold for the payment of the ancestor's debts. In some states statutes provide that the executor or administrator shall receive and retain the rents and profits of the real estate until the settlement of the ancestor's affairs, or until they will not be needed for the payment of his indebtedness.

4. Consanguinity, or kindred by blood relationship, is the relation of persons descended from the same stock, or a common ancestor. He is called the root or trunk of any stock from which the lines of descent are traced. This consanguinity is either lineal or collateral. It is lineal when existing between persons who descend in a direct line one from the other, as father, grandfather, and the like, and also when ascending, as son, grandson, and the like. Descent is collateral when persons are descended from a common stock, but not one from the other. Thus, a man and his nephew are collaterally related, as each may trace his line of descent to the same common ancestor. Were an ancestor to leave two children, and each of them two children, and so on through fifteen

generations, the original ancestor would have, of collateral kindred in the fifteenth degree, nearly two hundred and seventy millions.

By the canon law,[1] the relationship between father and son is in the first degree; between brothers, in the second degree; between uncle and nephew, in the third degree; between cousins, in the fourth degree, and so on. By the common law the degrees are somewhat different. As the civil or canon law is usually followed in tracing descent, nothing need be said concerning the other.

5. In tracing the rules of descent the American law has departed widely from the English. The old Roman system has been regarded with more favour, though even from this there have been several noteworthy departures.

One of these pertains to lineal or direct descendants, who, if standing in an equal degree from their common ancestor, share equally. By the common law, each lineal branch takes the portion which his parent would have taken had he been living. Thus, suppose X should die, leaving seven nephews; one of them is a son of his brother A, three are sons of brother B, and the other three are sons of brother C. By the Roman law each nephew would take a seventh part of the estate; by the common law the nephew who is the son of the deceased brother A, would take one-third of the estate; the sons of brother B would take another third; and the sons of C the other third. In some of the states the Roman rule still prevails. By the English law great importance is laid on the possession, or the right of possessing lands, with respect to inheriting them. By the American law

[1] By canon law is meant the law of the ancient church.

no distinction is made between the owner and the possessor of lands. Consequently, by our system the heirs of a reversioner, or remainder-man, by whom is meant a person who comes into the ownership of land after the termination of a prior estate, can take the same as absolutely as if their ancestor had been in actual possession. A remainder-man, or reversioner, therefore, becomes a proper stock or root of descent; in other words, he can devise property like the owner of an entire estate. Consequently, when he dies intestate, his estate is distributed among his heirs in the same manner as the estate of an entire owner who was in full possession at the time of his death.

By the American statutes an estate of inheritance generally ascends to lineal ancestors when there are no lineal descendants, the law preferring the former to the collateral branches. Thus, a maternal grandmother, with her big spectacles, is preferred by the law to a paternal uncle, when a person dies leaving neither father, mother, brother, nor sister.[1]

[1] "Statutes directing the inheritance of an intestate, in default of any child or descendant, to go to the father, and if no father, to the mother, and if no mother, to the brothers and sisters, in equal shares, and to the descendants collectively of deceased brothers or sisters, if any, the share the deceased brother or sister would have been entitled to if alive at the time of the intestate's death, have been adopted in Arkansas, Colorado, New York, and South Carolina. In default of descendants the father takes by statute in preference to the mother, brothers, or sisters of the intestate in California, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. In the states of Iowa, Kansas, Kentucky, Pennsylvania, Texas, and Wisconsin the father takes equally with the mother, and if she be dead, her share also, in preference to brothers and sisters. In Georgia, Illinois, Indiana, Louisiana, and Missouri the father, mother, brothers and sisters take equally; while in Alabama, Delaware, Mississippi, New Jersey, North Carolina, and Ohio the father is preferred

There is a great difference in the American statutes with respect to inheriting by persons of the whole and the half blood. In some states no distinction is made between them; in the larger number the right of inheriting by the half-bloods is postponed another period, or to a more remote degree. In no state are they fully excluded.[1]

6. Another difference may be noted with respect to

to the mother, but postponed to the brothers and sisters." 3 Kerr on Real Property, § 2264, p. 2283.

"According to the statutory provisions of some of the states, after father and mother, brothers and sisters are the next degree in the order of succession. These are not in the descending or ascending line of propinquity, but collateral to the estate. The brothers and sisters being members of the intestate's immediate family, are more nearly interested in the estate than any other relative, aside from the father and mother, and for this reason the law casts upon them the descent of the property, subject to the right of the surviving husband or wife, and frequently in connection with the father and mother. Brothers and sisters thus take in Alabama, Connecticut, Delaware, Mississippi, New Jersey, North Carolina, Ohio, and Pennsylvania. In Georgia, Illinois, Indiana, Louisiana, and Missouri brothers and sisters inherit with their parents, excluding more remote kin; while they are postponed to the father, and with the mother exclude remote kindred in Florida, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia. In the states of Arkansas, Colorado, Iowa, Kansas, New York, Pennsylvania, Tennessee, Texas, and Wisconsin brothers and sisters and their descendants are postponed to father and mother, but take to the exclusion of remote kin." Ibid, § 2266.

[1] "In some [states] no essential distinction is made, the statute declaring collaterals of the half-blood to be entitled equally with those of the full-blood in the same degree, as in Illinois, Indiana, Maine, Massachusetts, New York, South Carolina, Rhode Island, Tennessee, Oregon, and Vermont. In other states the preference is given to collaterals of the whole blood, as in Connecticut, Delaware, Georgia, Maryland, Mississippi, New Jersey, Ohio, Pennsylvania, and South Carolina. In still other of the states, as in Colorado, Florida, Kentucky, Missouri, Texas, Virginia and West Virginia collaterals of the full-blood take full shares, and of the half-blood half shares; but in none of the states of the Union are the half-blood wholly excluded." Ibid, § 2267.

inheritances which come to an ancestor by descent. These are sometimes called ancestral estates, to distinguish them from estates acquired by purchase. In some states ancestral estates descend to the kindred who are of the blood of the ancestor whence they came, whether in the paternal or maternal line. This rule applies until the relations in the particular line have all been exhausted.

7. Posthumous children inherit in the same manner as children born in the lifetime of their father. This principle is universally adopted.

8. Illegitimate children can neither be heirs of anyone nor ancestors of anyone except their own issue. While this is the rule of the common law, by statute, in many states, illegitimate children can inherit from their mother.[1]

9. The law applying to the descent of land is that of the state where it is situated, and not the law of the domicile or home of the intestate. This principle, also, is of universal application.

10. The land of an alien who is authorised to hold real estate will descend to his lawful heirs, and not escheat or pass to the state. On one occasion a person who was authorised by special statute to hold lands died, leaving an alien father and several alien brothers, and one brother who was authorised to hold land. The estate descended to him.

11. The land of every heir may be taken away from him for the purpose of paying the debts of the deceased

[1] In New York they are excluded from inheriting if there be legitimate issue, but this statutory exception perhaps exists in no other state. See note 3, Tiedeman's Real Property, p. 632.

owner. The law has wisely fixed a period of time within which creditors must act if they wish to appropriate the lands, or rather their value, of a person who has died, for paying their debts. Through neglect to act within this period, their rights to the land are forever cut off.

12. Claims or incomplete interests in land pass by descent. Thus, in our country, public lands are surveyed and afterward taken up by individuals on very liberal terms. The paper or instrument given to owners is called a patent. Once an individual took steps for getting a patent of a quarter section, but died before the grant was completed. It was surveyed, but not actually patented to, or secured by, the intestate during his life. The patent was issued to his heirs, and the court held that they took the land by descent, and not as purchasers. In another case lands were sold for taxes, but the purchaser died before the delivery of a deed; nevertheless they descended to his heirs. In another case the rent of land leased indefinitely went to the heirs of the landlord after his death, as a part of their inheritance.

13. In distributing estates among heirs deductions are sometimes made for advancements. These consist of sums which the ancestor has advanced to an heir, and charged against him with the expectation that they would be deducted from his portion of the estate. It is not an uncommon thing for a father to charge up the sums given to a spendthrift child, expecting that, on the settlement and division of the paternal estate, they will be deducted from that child's share. To justify their deduction this intention of the intestate must clearly appear.

§ 3. Acquisition of Land by Will

1. Who can make a will.
2. Minor can make a will.
3. Every interest in land may be devised.
4. Meaning of devise.
5. Statutory regulations about wills.
6. Will must be by law of the place where is the land.
7. Must be in writing.
8. Printed wills.
9. Must be signed.
10. When testator can make his mark.
11. Witnesses.
12. They must sign in testator's presence.
13. A witness cuts himself off from receiving anything.
14. When a will written by the testator requires no witnesses.
15. Credibility and competency of witnesses.
16. An executor can be a witness.
17. Competency of testator.
18. He must publish his will.
19. Who may be devisee or legatee. Corporation.
20. Description of devise.
21. Ambiguities.
22. From what time will take effect.
23. Lapsed legacies.
24. Revocation:
    a.—Some specific act is needful,
    b.—Destruction of it,
    c.—Marriage by a woman,
    d.—Accidental omission of legatee,

e.—Subsequent birth of child,
f.—Subsequent disposition of estate,
g.—The making of a later will,
h.—Revocation of joint wills.

25. Construction of will; intention.
26. Where the interest of the devisee rests in him.
27. Title by descent and devise compared.
28. Estate undevised rests in heir.

1. The law relating to wills is partly statutory and partly the creation of the courts. By the modern law persons have more authority or right to make wills than formerly. There was a time, not so very long ago, when a married woman could not make a will; now, in every state, she possesses this authority as fully as her unmarried sisters. By the common law males fourteen, and females twelve, years of age can dispose of their personal property.

2. In many states a minor, though quite incapable of making an agreement, can make a will disposing of his property. A clear distinction exists between the two, for a will is a gift of property to take effect after the testator's death, and not an agreement or contract; therefore, a person who may be incapable by law to make a contract can make a gift which the law will recognise and enforce.

3. Every interest in land except a mere possibility may be devised. It includes, therefore, easements and all kinds of estates or interests in them, as well as every kind of personal property.

4. The term "devise" relates properly to the giving or

parting with real estate; it will serve our purpose better to consider the whole subject of transferring both real and personal property by will in this section.

5. By a will the testator undertakes to dispose of his property after his death. All of the states in the Union have prescribed laws regulating the mode of making wills. These statutes provide, among other things, how wills must be witnessed. Most of the states require three witnesses. Another general statement may be made: a witness usually is cut off from taking anything under a will. Many a legatee or devisee has lost the bequest given to him through ignorance of this rule.

6. The law governing real estate given by will is that of the state where the land is situated. A different rule applies to personal property. This is governed by the law of the domicile or home of the testator. These two rules cover all the property which can be bequeathed by a testator.

7. Most of the states require that a will should be in writing. No particular manner of composition is prescribed. A testator may write his will; in many cases it is written by himself. Indeed, once a husband and wife, both possessors of a large amount of property, amused themselves for many years by indulging in this kind of literary work. As some of them were not dated, after their death the question proved to be very difficult to decide which was the last, and, therefore the true will or final disposition of their property.

8. Printing, engraving and lithographing are held equivalent to writing. The instrument may be written

with a pen or pencil; or it may be partly written and partly printed. Indeed, the courts go as far as possible toward sustaining any kind of a writing which in other respects is valid and proper.

9. A will must be signed, but a seal usually is not necessary,[1] except perhaps in the states of Vermont and New Hampshire. The statute of frauds requires a will to be in writing and signed or subscribed by the testator, He need not subscribe his name at the end; if this is done in any other place it will be effective; this rule, though. does not prevail everywhere.

10. A testator who is unable to write may make his mark, and this is a sufficient signing to comply with the law, whether common or statutory. Again, someone may guide the hand of a testator who is too weak from disease to write without assistance, and who requests this to be done. So, too, it is declared, if a testator through feebleness is unable to handle a pen, and requests another to sign his name for him, the signature will be a good signing without any mark whatever by the testator. Of course, when this is done, it should be accompanied by ample proof of the mode of signing, in order to escape all attacks that may be made on this unusual manner of execution.

11. The witnesses to a will are required to do more than the witnesses of a deed. In the latter case they are simply required to witness its execution; in witnessing a will they are also judges of the testator's competency; consequently, whenever there is a legal dispute concerning the testator's capacity, they serve as expert witnesses,

[1] It is almost everywhere appended.

and are required to give their opinion of his mental capacity. The office of witness to a will is, therefore, important, and, as a person may be thus required to testify, he should always be selected with the view of his performing possibly this service.

12. The testator need not sign in the presence of the witnesses, but they must sign in his presence. It is better for all the witnesses, as well as the testator, to be present at the time of performing this important act.

Many nice questions have arisen on this seemingly simple subject. Attestation in a different room, it is said, will be good, if the testator could see the witnesses when they were writing. Again, the witnesses may sign at different times and not in each other's presence, provided they all sign in the presence of the testator.

Generally, a will contains an attestation clause, declaring that the attesting was done in compliance with the statute in every particular. The witnesses sign below the attestation clause at the end of the will; in some states this is required by statute. By common law the witnesses are not required to sign in any particular place.

13. Though a devisee or legatee, by acting as a witness, cuts himself off from his share in the estate, the will itself is not thereby affected. Again, should there be witnesses to satisfy the statute, even though the name of such a devisee or legatee were not counted as a witness, his action in witnessing it would not affect its validity.

14. A will that is written by the testator himself is called a holograph, and, by the laws of several states, no witnesses thereto are required. It is said by some author-

ities that such a will is suspicious, especially of a testator feeble minded and notoriously under the influence of the devisee or legatee, who thereby acquires a large share of the property.

15. Some of the statutes require a witness to be credible, others to be competent. The two words are generally used synonymously. The law is very strict concerning the mode of signing and witnessing, and it is impossible to be too precise in all these particulars.

The three principal causes of incompetency in witnesses are mental imbecility, arising either from insanity or youthfulness; the commission of crime; and interest in the property willed. The most common cause of incompetency is that of interest. In most states a statute provides that a will is good even though the devise or legacy be void by reason of the witnessing of the instrument by the devisee or legatee. In some states there is another statute providing that, when a devisee has received no more by the will than he would have received as heir had the testator died intestate, he is a competent witness. The reason for this statute is apparent, for, even if there were no will, the person subscribing as witness would receive as much. In some states a witness who is incompetent by reason of interest may become competent by making an assignment or release of his interest.

It may be added that competency affects the wife or husband of the devisee or legatee. Thus, should a gift be made to one, and the other act as witness, the gift would be void. This rule does not prevail everywhere.

16. An executor or trustee can act as a witness.

17. The question of the competency of testators to dispose of their property may next be considered. Two classes are incompetent: minors and persons of unsound mind. Formerly, women were incompetent, but several states have removed their incompetency by statute.

The sanity needful to comply with the law cannot be easily described. The inquiry is, when the testator's sanity is questioned, had he, at the time of executing his will, sufficient mental capacity to make it; not, whether he was sane or insane. Says Chief Justice Redfield: "He must have undoubtedly sufficient active memory to collect in his mind, without prompting, parts or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their more obvious relations to each other and to form some rational judgment in relation to these." Courts have often declared it was not essential that the testator should be capable of managing business generally. His capacity is sufficient to make his will, provided he understands what he is doing. Of course, the question of capacity relates to the time of thus acting, and not to his condition either before or afterward.

A person who is not sane may make a will that is just as valid as any other, provided his insanity is not of a kind to affect his conduct as a testator. Again, an insane person may have lucid intervals during which he has a sufficient capacity to make a will. On one occasion a furious lunatic wrote a will, so proper and consistent in all its parts, that the court had no difficulty in sustaining it. In another case, that of an eminent lawyer, his will was set aside because, under the influence of a

delusion concerning his brother, he disinherited him. The question, therefore, is one of fact to be decided by the evidence in each particular case.

Lastly, a witness who is competent at the time of attesting a will does not become incompetent from any subsequent cause. The law simply requires competency at the time of his attestation.

18. A testator must publish his will; in other words, must declare to the witnesses that it is his last will and testament; and it is said that, unless he makes a declaration to this effect, the will is void. At the time of doing this the will must be completed.

19. Any person may be a devisee or legatee, including married women, minors, and corporations that are not prohibited by law from receiving a devise or legacy. A great question has long agitated the courts concerning a devise to a corporation not in existence. By the English law this can be done. In America perhaps no question has proved more difficult for the courts to decide. In one of the most recent cases it was decided that a testator could devise property to a trustee and entrust him with power to select or designate the object or objects of the testator's bounty. If, therefore, a testator creates a trust for a charitable purpose, defining his intention, and investing or creating the trustee with discretionary power over the application of his bounty to charitable purposes, the bequest will be sustained. If, in executing the trust, the trustee selects the beneficiaries and devises a scheme or plan by applying the funds given in accordance with the testator's intention, the courts will sustain the instrument and uphold the execution of the trust. One or more

trustees, however, must be selected. If neither a charity be named nor a trustee for executing it, then it would fail.

New York is the leading state denying this doctrine; likewise Virginia and Maryland, though less rigidly. In the former state the rule prevailing elsewhere is set aside by statute, destroying all trusts of this character. In a recent case the highest court in New York thus stated the law: "If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void. Nor is any distinction made between trusts generally and a trust for charitable purposes."

20. No formality is required in order to describe the subject-matter of a devise. It must be described with sufficient clearness to identify it; the law requires nothing more.

21. Sometimes there are ambiguities in a will. The law recognises two kinds of ambiguities—patent and latent. When a latent ambiguity exists, parol evidence may be used to explain the intention of the testator. The use of parol evidence is limited to these cases.

22. A will takes effect from the death of the testator, and the validity of all gifts relate to that time. For example, a devise to one who died before the testator lapses, or is of no effect. This principle of law has been corrected by statute, perhaps in all the states. This provides, in a general way, that a son or other relative of the devisee shall take his place; in other words, the lineal heirs of the devisee take the portion coming to him

by will. The statutes vary in detail; some confining the provision to the lineal heirs of a deceased son or grandson, others extending the benefit to the general heirs of any relative who is named as a devisee, while others go still further and declare that the heirs of all devisees are capable of taking in their ancestor's place, thus avoiding altogether the doctrine of lapses in the event of the death of the devisee.

23. It is also a general rule, unless there be statutes to the contrary, that lapsed legacies and devises vest in the heir at law.

A devise to two or more joint tenants will not lapse on the death of one, not even his share, but the survivors take the entire estate.

A different rule applies to the devise of tenants in common. If one dies his portion lapses, and the others take their respective portions.

Under a devise to a class, the individuals of which change—for example, a devise "to my children"—those who survive the testator take the entire devise, and, in such a case, there can be no lapse unless all the persons included in the class have died before the testator.

24. As a will is not effective until the testator's death, he can revoke it at his pleasure. To do this, a specific act of some kind is required. A revocation may be express, or implied when the testator does some act clearly inconsistent with the existence of the will. Thus, should a testator sell the land devised to A, this would operate as a revocation of the devise, and, if this land composed the entire estate, the sale would operate as a revocation of the will.

(*b*). A very common way of revoking a will is by destroying it. If it is burnt or ceases to be, the revocation is complete. Not infrequently the action of a testator in revoking his will is not so clear or effective as it might be. It is sometimes said that as much capacity is required to revoke a will as to make one. At all events, a revocation does not become effective without clear action on the part of the testator indicating his intention to annul the instrument.

In one of the cases a testator had endorsed in his own handwriting "cancelled" on the will, without signing it. This was held to be a revocation. In another case a testator had written against one of the bequests of the will "obsolete"; this was held not to work a revocation. It was simply a revocation of that bequest, not a destruction of the entire will.

In an Ohio case a testator was blind and called for his will, which was handed to him. After feeling of the seal, he handed it to another and told him to put it in the fire. Instead of doing this he put the will in his pocket and burned another piece of paper, telling the testator he had destroyed it. After the testator's death the will was produced and allowed, the courts declaring that he had done none of the acts which by statute were needful to revoke a will. Was not this case wrongly decided? Was not a fraud practised on the testator which the court ought to have regarded?

(*c*) What is the effect to a woman of marrying after making her will? Generally, by statute, of revoking it, especially after the birth of children.

(*d*) Sometimes, a testator, by accident or intention,

omits the name of a child or grandchild in his will, and then questions have arisen concerning his rights. The law regards the omission as accidental, and the omitted person may share the estate of the testator the same as if he had died intestate. This rule applies to the grandchildren as well as to children; also to children born after the making of the will. Of course, a testator may intentionally omit a gift to a child or other relation, and, when this intention clearly appears, it will be regarded.

(*e*) In many of the states the birth of a child after the making of a will operates as a revocation, the law regarding the non-destruction or non-revocation by the testator as an act of forgetfulness.

(*f*) The disposal by a testator during his lifetime of land, devised to a person, of course, revokes the devise. This also applies to cases of sale by a testator who has not yet made a conveyance.

(*g*) One of the most frequent ways of revoking a will is to make a subsequent will or codicil. The rule is universal that the last will speaks the mind of the testator. As a codicil is a supplemental will, it revokes the will itself only so far as the two may be inconsistent; but an entire will made at a later date operates to destroy the other. But a prior will that has been cancelled or revoked in an express manner cannot be revived without a republication in a manner as formal as the original will. Yet it has been declared that the execution of a codicil which contains an express reference to a prior will is a sufficient republication to restore it to life.

(*h*) Sometimes joint or mutual wills are made; when they are they can be revoked by either testator until one

or the other dies; after this event revocation by the survivor is impossible. The death of one of the testators is such a part performance of the agreement between them as to prevent the revocation by the other.

25. A cardinal rule in construing wills is intention. This the courts try to ascertain and regard unless it is contrary to positive law.

The courts have a stronger regard for the testator's intention in construing a will than a grantor's intention in construing a deed. Such is the rule of law, though with the progress of jurisprudence the intention of a grantor in a deed is regarded more scrupulously than it was a century ago. In other words, the spirit of justice more and more informs the law; rigid and technical rules meet with less and less favour.

Though the books contain thousands of cases pertaining to the construction of wills, no good purpose would be served, did space exist, by reproducing them. The principal rules of construction adopted by the courts are important, and these will now be given.

If an estate is devised to A for life, and the remainder after his death is to go to B, and A dies in the testator's lifetime, the estate goes directly to B on the death of the testator.

If the devise is to a wife for life in lieu of dower, and the estate after her death is to go to her daughter and the wife declines to accept the devise, in like manner the daughter takes the estate at the death of the testator.

A devise of the rents and profits of land or the income is equivalent to the devise of the land itself, and is for life, or for all time, according to the words used in the devise.

A testator may create a charge on land in favour of a third person, and whoever takes the estate becomes chargeable therefor; in other language, takes the estate charged with the legacy. Whether he does, or does not, turns on the inquiry, whether the charge is a personal one on the devisee, or is on the land devised. In the former case it is not charged on the land; to create such a charge it must be clearly declared to be one.

26. The interest of a devisee vests immediately on the testator's death, and, after proving the will, relates back to that time. If, therefore, it be in terms a present devise, and the devisee is not in existence at the time of the testator's death, the devise is void.

27. If the title by will be the same in quantity and quality as the heir would take by descent, the law regards him as an owner by the latter manner. This rule of construction rests on the legal principle that a title by descent is of greater worth than a title by devise or will.

28. Any estate that a person leaves undevised vests at once in his heir. Yet it may be taken from him when needed for the payment of the testator's debts. In contesting the title of an heir, intestacy is always presumed until the contrary is proved.

§ 4. Acquisition of Land by Occupancy and Prescription

1. Law presupposes a grant.
2. Why law favours this mode.
3. What acts are effective.

1. Another mode of acquiring land is by prescription or adverse use. A favourite theory has been often repeated, that a grant was once made and that the deed of conveyance is lost.[1] This is one of the numerous fictions of the law, which play a nobler part than most of the fictions in ordinary literature.

2. One reason why the law favours this mode of acquisition is to quiet the title, so runs the phrase. An individual who has been in possession of a piece of land, openly and notoriously for the period fixed by the law, claiming, occupying, and using it as his own, whether holding the same under a deed of conveyance or without one, the law says shall henceforth be regarded as the true and lawful owner, with as perfect a right to use, sell and devise the same as any land acquired by inheritance, will, or purchase. This principle of law is far-reaching and effective. By its operation the titles to land, after a short period, become clearly known, and thus, at all times, the only disputed titles are very few compared with the entire number. The period varies in the states from three to thirty years.[2]

3. What acts are open and effective within the meaning of this rule? Says a well-known author: "Any visible or notorious acts which clearly evidence the intention to claim ownership and possession will be sufficient to establish the claim of the adverse possession." Acts of this nature are the maintenance of fences and the erection of buildings. Hence, the secret use of the

[1] See 3 Kent's Com., 419.

[2] In Louisiana the period is thirty years; in most of the states the period is fifteen or twenty years. See note to 3 Washburn, p. 148.

premises unknown to the owner will not suffice. Nor would a survey thereof, nor the running of a line, nor the lopping of trees, indicate its location.[1] In harmony with this principle, when the owners of adjacent lands claim only to the true line between them, the possession of one beyond is not adverse to that of the other; consequently each must conform to the true line as soon as it is defined. But if a purchaser encloses by mistake land contiguous to his own, believing that he is putting his fence on the true line, and keeps it there for the period required to gain ownership, he becomes the real owner.

Again, if two adjacent owners agree upon the location of a line for a division fence between them, and each holds possession for the statutory period up to that line, the title of each owner becomes perfect without reference to the true boundary line between them.

§ 5. Acquisition of Land by Accretion

1. Deposit.
2. Islands.
3. Alluvion.
4. Avulsion.
5. Land bounded on shore-lines of non-navigable rivers.
6. How owner may protect his land from wasting away.

1. Another mode of acquiring land is by actual making or deposit through the operation of natural causes. Thus,

[1] See Chap. IV., Sec. 11.

seaweed and other marine plants wafted on the shore become vested in the owner of the soil. In like manner, the owner of land which has been increased gradually through the action of water becomes entitled to the addition.

2. Sometimes islands are formed in the sea or in navigable rivers. These belong to the state. A different rule applies to islands formed in a non-navigable or non-tidal stream. In this an island that forms on one side of the thread belongs wholly to the land-owner on that side; on both sides its ownership is divided. Lands that border a non-navigable stream belong to adjacent proprietors and are divided by the thread or central line. When this line slowly changes by the removal of the land from one side to the other, it still remains the boundary between the adjoining proprietors.

3. The owner of a strip along a river may rightfully retain an accumulation of sand, earth, loose stones, and gravel brought down by a river, and known as alluvion. Its chief characteristic is its imperceptible increase. Again, a riparian owner on a navigable stream has a right to remove and sell sand which has been deposited as alluvion between high- and low-water marks. Should a railroad company, for its own purpose, and not for the improvement of the stream, erect an obstruction on the opposite banks which should change the current and sweep away the sand and prevent further deposits, the riparian owner would be entitled to recover damages both for the sand thus swept away and for the loss of future alluvion.

On one of these occasions an accretion of land had

formed along the levee at New Orleans on the bank of the river, which had been dedicated to public use. The alluvion was declared to be a part of the public levee. If the land of a private owner should run down to a river without any intervening public way, he would have the accretion to the bank as an incident of his ownership.[1]

To acquire ownership in this manner the accretion must be slow, imperceptible from day to day, though seen clearly enough after a considerable length of time. This may seem to be a somewhat indefinite test, yet has proved to be practical. The addition to lands during short periods is clearly seen at some places as well as the wasting away of lands at others. Yet the owners of the disappearing land have no claim on the owners of the new land, for the reason that there cannot be such an identification of the soil as will meet the requirements of the law. Legal principles are intended for practical operation, and it would be highly impracticable to reduce the rights of the gainers and losers of soil by these operations of nature to a nicer or more subtle principle.

This right to accretions is sometimes gained by the gradual lowering of the water of a lake or pond. These belong to the adjacent owner.

In New Jersey an increase of land adjacent to the sea is so gradual in some places that it cannot be observed while actually going on, although the change is visible from year to year. It was long ago decided that these accretions belong to the owner of the land to which they are made. But, in Louisiana, no private title is recognised to any accretions from the sea.

[1] 3 Washburn, § 1883, p. 72.

4. The process of taking soil by the sudden action of water from the land of one and depositing it on the land of another is known as avulsion. The soil still belongs to the first owner, unless his ownership is gone by the union of the soil with that of the second owner. Of course, to reclaim it, he would be obliged to prove its identity.[1]

5. In conveying land bounded on the shore line of navigable waters, the deed will include the accretions.

6. An owner of riparian land may rubble his bank to prevent the water from washing away his soil, but he cannot build anything into the stream that will change its current for the purpose of land protection.

§ 6. Acquisition of Land by Public Grant

1. Public ownership.
2. Construction of public deed.
3. Form of conveyance.
4. Certificate of entry.
5. Death of purchaser before issue of patent.
6. Assignment of certificate and issue of patent in assignor's name.
7. Identification of land.
8. Pre-emption right.
9. Cannot be assigned.
10. Conveyance by pre-emptor.
11. Creditors cannot levy on him.

[1] "Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel." New Orleans v. United States, 10 Pet., 662, 717.

1. All lands in this country are vested in the state or the United States. Those belonging to the general government, though located within the limits of the state, are under the former's control. Other public lands are under the control of the state, unless it has conveyed them away. The laws that apply to lands are those of the state or territory wherein they are located. This principle applies everywhere.

2. There is another principle of construction. In grants between the state and an individual, a deed is always construed in favour of the state; in grants between one individual and another, the grantee is favoured.

3. There is no special form of conveying a public grant. It may be done by a special, or a general act of Congress. Millions of acres have been sold by authority of Congress, and general laws have been passed for conveying them. These will be briefly described.

4. A purchaser desiring land may, after the payment of his purchase money, receive from the register of lands a certificate of entry, which entitles him to a patent. This is a formal deed of conveyance required for the perfecting of his title, signed by the President of the United States, or the Secretary of the Interior, or by some other officer duly authorised by act of Congress.

By granting a certificate of entry to a person, he is vested with an imperfect legal title. It is good enough, however, to enable him to maintain an action of ejectment or trespass against a wrongdoer.[1] Again, after issuing the certificate to him, the land cannot be sub-

[1] Brummett v. Pearle, 36 Ark., 471; Broussard v. Broussard, 43 La. Ann., 921.

sequently sold by the Government to another. The certificate also vests in the purchaser a sufficient title to enable him to sell or devise it.

5. Should the purchaser die before the patent is issued the land would descend to his heirs; of course, the patent ought then to be made out in their name; but, should it be issued in the name of the purchaser, not knowing of his death, his heirs could maintain their ownership.

6. A purchaser who assigns his certificate of entry and takes out a patent in his own name, as is sometimes done, will hold the legal title for his assignee; were he unwilling to convey to the true owner, he can be legally required to make a conveyance.

7. In all cases the land must be so described in the certificate of entry that it can be identified. An inaccurate or obscure description bars the right to a patent.

8. To encourage immigration and settlement of public lands, Congress long ago provided that an actual settler on public land, who makes an entry in the records of the land-office of his claim, with a proper description thereof, acquires a pre-emption right, which entitles him to a patent of the land thus occupied at a minimum price fixed by law. By taking such action he gains a superior claim over the land to all other persons. He cannot acquire, in this way, a right to all creation, but only a quarter section—one hundred and sixty acres. Furthermore, he cannot acquire any right in a reservation, or to land located in a town or city, or that which has already been taken, or is known to contain minerals. In other words, the law aims simply at the distribution of lands adapted to agricultural purposes.

Again, he must take oath that he does not own a section in the state or territory, or that he has not abandoned a claim elsewhere in the same state or territory in order to take up a quarter section of the public land. When he has thus pre-empted it he acquires essentially the same rights therein as are acquired by a person to whom a certificate of entry has been given. To perfect his title therefor he must pay the purchase money required by law within two and a half years after pre-empting the same.

9. His title, though incomplete prior to receiving the patent, descends to his heirs, but it cannot be assigned, thereby giving an assignee a right to the pre-emption as against the Government, or to anyone claiming under a patent.

10. But when the pre-emptor undertakes to convey before he has acquired the legal title, the assignee can acquire a title by instituting proper proceedings.

11. In like manner creditors cannot levy upon a pre-emption right and take it to discharge the owner's indebtedness.

§ 7. Acquisition of Title by Estoppel

1. What is an estoppel.
2. Kinds.
3. Nature and effect.
4. What must be done to establish an estoppel.
5. A misrepresentation that does not mislead is not an estoppel.
6. Effect of record as a notice.

7. A temporary possessor of land by agreement is estopped from denying other party's title.
8. Estoppel by deed.
9. Who are bound by an estoppel.
10. Estoppel does not bind grantor by repurchase.

1. Estoppel arises in those transactions wherein the law draws some conclusions from the acts of one party in favour of another concerning the ownership of lands, which it will not permit him to controvert or deny. Thus, should a man named Smith sign a deed as Jones, he would be estopped by law from proving that his name is Smith in order to avoid the deed he had signed. Putting the rule in a more general form, one who has the means of knowing his rights should not mislead another and influence him to do that which he would not, if he knew the true situation. One, therefore, who is unmindful or careless in his misrepresentations must bear the loss caused by his own conduct.

Sometimes the courts have declared a different rule; namely, that one who has misled another unintentionally can, after indemnifying, be permitted to regain fully his rights.

2. Estoppels are divided into two kinds: Estoppels by act, which arise by the positive act of an individual; and estoppels by deed, which spring from the construction of a deed or writing he may have given.

3. One or two illustrations may be given to show more clearly the nature and effect of this principle. A man dedicates a piece of land as a public square, which is accepted, and individuals, supposing that the square

will always exist, build larger and more costly houses than they otherwise would have done. The dedication cannot be afterward revoked. Nor does the estoppel depend on the length of the time such individuals have been occupying the ground around the square.

4. To establish an estoppel three things must be shown: First, that the person who is sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or, at least, had reason to believe that another would be influenced thereby; second, that the other party has been influenced by the act or declaration; third, that the other party will be prejudiced or injured by permitting the act or admission to be disproved.

Thus, A was about to purchase a piece of land adjoining B's. Not knowing the exact boundary line, he asked B to point it out, which was done. B knew at the time of A's inquiry that his object in inquiring was not curiosity, that he was about to become the purchaser. Having purchased the land, B was estopped from denying that the line he had pointed out to A was the true one.

The chief or fundamental thought in the judicial mind has always been the fraud that would be perpetrated on the innocent party if the other were permitted to deny his representation or action. The case above mentioned illustrates this idea as clearly as would a thousand others. A, for example, relying on B's statement, purchases the land and makes improvements, building, perhaps, an expensive house and adorning

the grounds. If B could afterward say that he had made a mistake, acting without the full knowledge of his own rights, and were permitted to show that the true line was somewhere else, A's would be the loss, perhaps a serious one. The law estops B from doing such a thing.[1]

5. An incorrect representation concerning one's boundary line or other matter, though not misleading, because the other party has the same or better knowledge himself, creates no estoppel. The element of fraud is absent, because, whatever may have been the intention of the party who made the statement, the other is not defrauded or injured thereby.

6. A man who holds a title to land that has been duly recorded thereby gives all the notice required by law, so long as he remains passive. It is only when another is purchasing land on which the seller has some unrecorded lien or charge, unknown to the purchaser, that he is bound to give notice. In such a case, should he fail to give the notice, he would be estopped from setting up a claim against the purchaser. In a case of this kind a tenant had erected a bowling alley on the land of his landlord, and, during the term of the lease, the lessor offered the estate at auction. The lessee put in a bid, but another bid higher. The owner of the bowling alley was not estopped from claiming and removing it as a fixture, nothing having been said about it at the time of the sale. In judicial language, "it is only when

[1] The Supreme Court of Pennsylvania has thus stated the rule: "The primary ground of the doctrine is, that it would be a fraud on the part of a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. The element of fraud is essential either in the intention on the part of the party estopped or in the effect of the evidence which he attempts to set up."

silence becomes a fraud that it postpones."[1] No man can set up another's act or declaration as the ground of an estoppel unless he has been misled or deceived thereby.

7. One who enters into the possession of land under an executory contract with another is estopped from denying the latter's title, for this would be a violation of good faith in obtaining possession.

In like manner one who is under an obligation to give up the possession of the land to another, a lessee, for example, is estopped from denying the title of his landlord. The occupant is regarded as having pledged his faith to depart, and will not be permitted to do anything to impair the landlord's title.

8. An estoppel may be effected by deed. This is founded on the idea that the grantor or seller is not permitted to set aside his deed by an inconsistent act. He is, therefore, estopped from denying his title, and, should he acquire one after parting with his own, he could not set this up to defeat it. In other words, after making a conveyance of his property, he is bound by his action, even though not the possessor or owner at that time, but afterward.

The covenants of warranty in a deed raise an estoppel. A defective deed cannot create such an estoppel, for the simple reason that it is not a valid act of transfer.

In like manner an ordinary quit-claim deed, conveying all the right, title and interest of a grantor, does not work an estoppel, for the reason that the grantor, by his conveyance, does nothing more than convey whatever

[1] Hill v. Epley, 31 Pa., 331.

title he may have in the property. If he possesses none no title is granted, and no estoppel can grow out of the operation.

A man acquires nothing by a deed from one who has neither title nor possession. This is clear enough without further discussion. Some of the states have settled this question by enacting that a title acquired afterward by a grantor passes instantly from him to the grantee. Where such a statute exists there is no room for more questioning.

9. An estoppel binds the representer and all who are in privity with him by relationship or otherwise. A stranger cannot take advantage of an estoppel, nor can he be bound thereby. Again, no one can enforce an estoppel except the person to whom the representation was made, or those who are in privity with him and claim under him.

In order that one may be bound by an estoppel, he must be legally capable of making a valid deed. Minors and married women cannot be bound in this manner.

10. A grantor or seller may reacquire his title by adverse possession, for in doing so he is not acting contrary to his original grant or sale. By thus acquiring a title he is simply acting like one who should subsequently become a purchaser by the simple process of repurchasing.

§ 8. Abandonment of Land

1. Land may be thus lost.
2. What is an abandonment.

3. Title cannot be acquired by abandonment.
4. Effect of redelivery and destruction of deed.

1. The ownership of land may be lost by abandonment. When the fact of abandonment is unquestioned no one who may have taken possession can be compelled to relinquish his acquisition. Whether land has been abandoned or not is a question of fact to be ascertained in the same manner as facts usually are.

2. Some limitations to this principle may be given. The mere non-user of a way for a certain time does not work an abandonment of the owner's right to enjoy it. But, if a lessor enters and expels his tenant, who does not choose to re-enter, the rent is gone. If he returns the rent is suspended only during the time of his expulsion. A man may abandon an easement by exchanging it for another.

This principle is not often applied in practice, for people rarely give up intentionally what truly belongs to them. Consequently the efforts to show that the owners of lands have abandoned them are in most cases fruitless, because there is every presumption against such action. A strong case, therefore, is required to perfect an abandonment.

3. Though a title may be lost by abandonment, no one can acquire a title by such action on the part of another. In other words, though a legal title can be divested or lost by abandonment, no other person can acquire a title by the abandoner's action.

This question sometimes arises when a person has acquired a title by adverse possession, or is seeking to

acquire a title by adverse use. It is plain enough that, if one's title is not complete, as we have explained, and he abandons his land, the former owner regains his possession for the reason that his title had not become extinct at the time of the abandonment. But a different principle applies to a title that has become complete by the adverse use of another.

4. On the redelivery of a deed by the grantee, followed by its destruction, the title is revested in the grantor, unless the deed has been recorded. Says the Supreme Court of New Hampshire: "It is well settled in this state that the redelivery, by a grantee to his grantor, of an unrecorded deed, with the intention and for the express purpose of having it cancelled, and of revesting the title to the premises therein described, in the grantor, has precisely the effect intended, upon the principal of estoppel."[1]

After recording a deed nothing short of its cancellation has the effect of passing the title back to the grantor.

[1] Dodge v. Dodge, 33 N. H., p. 495.

CHAPTER IV

MODES OF LIMITED OWNERSHIP

§ 1. By Tenant for Life

1. Mode of creating an estate for life.
2. For whom it is created.
3. Rights and duties of life-owner:
   a.—Improvements.
   b.—Payment of interest on mortgages.
   c.—Taxes.
4. Relation between life-tenant and reversioner.
5. Who is entitled to crops.
6. Waste.
7. How land must be improved.
8. Remedies for wrongs committed by life-owner.

1. Next to absolute ownership may be mentioned ownership for life. Such ownership is often created by will, the testator giving the use of his land to a son during his lifetime, and, after his death, then to the son's child or some other person. This is the most usual way in which estates for life are created. They are very common, though perhaps less so than formerly. The old system of entails, as they are called, which still prevails in England, whereby different interests in land are carved

out for the purpose of perpetuating the family name and grandeur, has never received much countenance in America. Furthermore, the wealth invested in land is forming a constantly diminishing portion of the entire wealth of the country, and consequently there is a weaker desire to entail or perpetuate interests in land than formerly when it constituted by far the largest part of a person's wealth.

2. Nevertheless, estates for life are constantly created by will for the especial benefit of the children of the testator; and the principal modern questions that arise relate to the mode of using the land thus inherited. Besides these are other questions pertaining to the validity of such estates. As the answers to the second series of questions depend largely on the construction of the instrument creating them, they need not be considered here. [1]

3. What are the rights and duties of an owner of a life-estate?

(*a*) For improvements made on the land he cannot claim compensation from the person who is to receive it after him, usually called the reversioner or remainderman. On the other hand, he is under no obligation to do more than to keep the premises in repair. He may complete, at the expense of the testator's estate, a mansion-house which was begun by the testator. The expense of putting the house into a tenantable condition is a charge that must be borne by the estate of the testator, not by the person who is to become the possessor for life. But, having once come into possession, after

[1] See Section 3 on Wills.

the completion of repairs, it is his duty to maintain them afterward.

(*b*) Another important duty is to pay the interest on any mortgage or other encumbrance that may exist on the life-estate. He is not required to pay the principal, however, and should he be obliged to do so in order to retain his life-estate, he would become a creditor of the testator's estate. On the other hand, the voluntary purchase of a mortgage on the estate, the law regards as done for the benefit of the reversioner as well as himself, and the amount must be divided in some equitable manner between them.

(*c*) With respect to taxes, the life-occupant must pay them, as they are an annual charge and do not affect the reversioner. An assessment for permanent benefits is like a mortgage, and, as the land is thereby permanently increased in value, the expense must be borne by both the possessor for life and the reversioner. Should the assessment call for the payment of a given sum annually, like the interest of a mortgage, it would be the duty of the life-owner to pay the annual sum accruing, and the remainder-man or reversioner the principal.

The rule, perhaps, is without qualification that the occupant for life must pay all the taxes assessed on the estate. If, therefore, he neglects to do this, becomes bankrupt, and a receiver of his estate is appointed, he may take so much of the rent accruing from the use of the land as may be needed to pay the taxes due to the public. In Ohio a life-occupant who fails to pay the taxes forfeits the estate to the reversioner or remainder-

man. This effect of his neglect in that state is by virtue of a statute.

The life-occupant cannot take advantage of his own wrong in neglecting to pay taxes, to buy property at a tax sale and thus defeat the estate of a remainder-man or reversioner. As between these persons, the purchase simply has the effect of discharging the taxes. Furthermore, though the life-estate and remainder be destroyed by a valid tax sale to a stranger, the remainder-man still has a claim against the life-occupant for his neglect to perform his duty. On the other hand, the remainderman may purchase at a tax sale and acquire a good title against the life-occupant for the reason that he owed no duty to him to pay the demands of the state.

4. The position of the life-occupant is deemed to be opposed to his reversioner. Consequently, his deposition, for any reason, does not affect the rights of the reversioner. He may enter or recover possession within the period fixed by law after the death of the life-occupant, without regard to the length of time he may have been dispossessed. Again, one who enters on the land of the life-occupant, by virtue of an agreement with him, and remains there after his death, is transformed into a trespasser, for the life-occupant can do no act which affects the title or interests of the reversioner.

Should the life-occupant lease the land and die before its expiration, the entire rent would belong to the reversioner. This is the rule of common law, founded on the principle that the rent cannot be divided. This rule has given rise to much controversy, and is so contrary

to justice that, in many states, it has been set aside by statutory or judicial action. Therefore it may be said that, perhaps in every state, the rent may be apportioned or divided in a case of that kind between the legal representative[1] of the life-occupant and the reversioner.

Another question growing out of the life-occupancy of land is, who are entitled to the crops planted before and maturing after the termination of the occupant's estate? The general principle is that annual crops belong to the representative of the life-occupant, but, in some states, they descend to his heirs. In other language, they go to the executor or administrator because they are a part of the occupant's personal estate, and do not belong to his heirs. The right to them carries also the right of entering the land, cultivating the crops, and harvesting them when they are ripe.

Another question closely related to this is, what crops are annual within the meaning of this rule? It may seem to the reader as if such a question is too plain for discussion, but an attempt to answer it reveals difficulties. Among the annual crops are corn, beans, hemp, flax, melons, potatoes, grasses, and the like, which are annually renewed. But what shall we say of crops that are grown on permanent roots? The law says that these, too, may be included; also turpentine taken from trees, because the produce is gathered annually. On the other hand, clover and other grasses which endure for more than a year are not included, nor the fruits of trees growing on the land, even though planted by the life-occupant. To this rule an exception is made of trees and shrubs

[1] By legal representative is meant his executor or administrator.

planted simply for sale by gardeners and nurserymen who are life-occupants, as this is their sole object in planting them.

The right to annual crops is not an incident simply to life-occupants alone, but to the occupants of all estates of uncertain duration. If a tenant, knowing that his estate will end before he can gather his crops, and thus knowing plants them, his folly is his own, and his successor will be the gainer.

Again, the estate must be determined by the death of the occupant or by some act other than his own, for, by a voluntary abandonment of the land, he forfeits his right to claim the crops growing thereon. Thus, should a doweress marry and lose her right of dower, the crops growing on her land would also be lost.

This right to the crops is not limited to the original occupant for life, unless he is restricted from underletting his estate. His assignee or grantee possesses the same rights as himself, and, in some cases, may claim the crops when the original possessor could not. Thus, it is said that, if a widow should, during widowhood, underlet her land and then marry, thereby losing her own right to the annual crops, her tenant would not because he had kept within the law.

6. Another important principle governing an estate for life is, no waste can be committed that will essentially injure or impair the future estate. This principle, which is easy enough to state, is very difficult to execute. Hundreds of cases of this nature have arisen, nor do we suppose the end of them will soon come.

Waste may be either voluntary or permissive. The

first is some act done which injures the inheritance; the other is the omission of some duty yielding a similar result. To tear down a house is voluntary waste; to suffer it to decay is permissive.

The application of this rule to trees is sometimes difficult. The common law rule is that to fell timber, or to cause its decay, is waste. But what kind of trees are to be regarded as timber-trees? Some of them are clearly defined, like oak, ash and elm; others, like willow, are just as clearly not within the category; while others are in the doubtful list. An eminent author, whom we have before cited, says that, in this country, the question may be answered by ascertaining the standard or practice of a prudent farmer. What would he do with his own land, having regard to it as an inheritance?[1]

This question has often arisen in states where the lands are covered with forests and cannot be cultivated until they are cleared of the timber. In these the question turns on the custom of farmers and on the value of the timber; whether, by clearing the lands, so much timber has been cut as to injure the inheritance.

Wood cut by a life-occupant in clearing the land belongs to him—and as an incident he may sell it; but he cannot cut wood expressly for the purpose of sale. Again, when sued for cutting and selling timber he cannot make a counter-claim for improvements on the premises at another time; but he can remove cut, or decayed, timber, to clear the land and give young trees a chance to grow.

Sometimes timber is blown down; when this happens the life-occupant is entitled to a quantity for firewood.

[1] 1 Washburn, § 274, p. 130.

To carry off trees that have been blown down is to render himself liable for their value.

Another kind of waste consists in opening gravel-pits and selling gravel or clay for brick-making. An occupant for life can neither take clay nor cut wood for the purpose of making bricks for sale, unless this has been the usual mode of improving the land. In such a case he would have the right to continue to use it like previous occupants.

For the same reason he cannot search the land for mines, and, after their discovery, open them and proceed to work them. But mines already opened on taking the estate he may continue to work, even though he should exhaust them, for, in so doing he is simply taking the profits of the soil. Furthermore, he would not be guilty of waste in opening new shafts or pits following the same vein or veins as those already opened at the time of taking possession. The general principle, therefore, is, he can improve the land in the same manner as his predecessor, but cannot impose new burdens or new uses; and all improvements that he may have made on the land in working mines and in other ways belong to the reversioner whenever he takes possession.

The life-occupant must improve the land in the manner required by good husbandry, and any violation of this rule is waste. This phrase is a relative expression varying greatly in different countries and places. A few illustrations may be given. For example, it would be waste to let pasture lands be overgrown with brush, to impoverish fields by constant tillings, to remove manure made in the ordinary course of husbandry, to

suffer a bank to become weak or broken whereby water will overflow. Once it was said that adapting a building to a new purpose, or converting two chambers in a house into one, would be waste. This rule has been displaced by the more rational test, will the act essentially injure the reversioner's inheritance? In a well-considered case it was remarked that the life-occupant has no right to pull down valuable buildings, or to make improvements or alterations, which would materially or permanently injure or change the nature of the property. On the other hand, it cannot be waste to make new erections which can be removed at the end of the term without much inconvenience, leaving the property in the same situation as before.

A life-occupant who takes possession of a ruinous house cannot be made responsible if he suffer it to remain so; but he may repair it if there be timber on the land fit for the purpose. It would be double waste to suffer a house to go to decay and then cut timber to make repairs.

8. There are two remedies against the life-occupant who is guilty of committing waste, which are worthy of brief mention. One is an action to recover damages for the injury; the other, and more common, remedy is an injunction to prevent him from committing waste. If, for example, the occupant is about to cut timber or open mines, or do any other thing which will injure the inheritance, the reversioner or remainder-man can apply to a proper tribunal to restrain him from doing these things. This is the common and more effective remedy, but the occupant may commit a serious injury before the

remainder-man's discovery. While the reversioner is journeying around the world the life-occupant may have improved his opportunity to despoil the other of his inheritance. When this has happened the only remedy left to the reversioner is to recover damage for the injury.

§ 2. By Husband as Tenant by the Curtesy

1. Curtesy defined.
2. There must be a legal marriage.
3. Wife's estate must be inheritable.
4. Birth of a child.
5. Duration of his estate.
6. It can be taken for his debts.
7. He may forfeit his estate.
8. How estate by the curtesy has been affected by legislation.

1. A husband acquires an interest or estate in land belonging to his wife after her death, and is called a tenant by the curtesy.[1] Four requisites are needed to create such an estate: her lawful marriage; her possession of the land during her marriage; the birth of a child alive during her marriage;[2] and her death.

2. The marriage must be legal. Though a marriage is unlawful, if it is not set aside during the life of the wife, the estate of curtesy will arise at her death. The marriage cannot afterward be declared void.

3. The wife's estate must be inheritable. The curtesy

[1] See Vol. VI., Chap. I., Sec. 3, § 22.

[2] See p. 126, § 4, for exception.

extends to various equities and interests she had in lands; also to money which was intended to be laid out in them for her benefit. In such cases, as in others previously mentioned, equity treats the money as land itself; and the husband takes the same interest in the money that he would take had it been transmuted into land itself.

When the wife's interest in land rests on a condition that may defeat her interest, the husband's curtesy may also be defeated. In other words, his curtesy never survives after the destruction of her interest. In accord with this principle, should the wife own land with two or more joint tenants, and die, her husband could not claim the curtesy because, from the very nature of joint tenancy, the land belonging to the joint tenants on the death of any tenant passes to the survivors.

Formerly, the wife's possession was regarded as essential to create an estate by the curtesy in her husband after her death; in many states this principle has been modified. So far, indeed, that on the completion of her title, though she is not in formal possession at the time of her death, her husband is entitled to his curtesy.

A different principle applies to wild land, for the ownership draws the legal possession without having taken actual possession. In Kentucky, however, actual possession is requisite in order to give the curtesy in wild lands.

The husband can have no curtesy in land of which his wife is possessor merely as a trustee.

4. The wife should have a living child who might possibly have inherited the estate, otherwise her husband's

curtesy will not arise. It is immaterial whether the child was born before or after the wife acquired her estate. The important fact is, would the child, if living, have inherited the estate? If so, the husband is entitled to his curtesy therein.

As soon as a child is born the husband's right to curtesy is said to be initiate, or to have begun, and is consummate only at death.[1] This is the common law rule, but "in many states," says Washburn, "the necessity of a child being born is dispensed with by statute."[2]

5. His estate, though having its origin in his obligation to support his children, is only for his own life. Nevertheless, his right is just as complete, whether they need his support or not; or whether they live for a brief space, or for many years.

6. The husband's interest, initiate as well as consummate, can be taken for his debts, nor can he defeat the right by any disclaimer, nor will equity interfere in favour of wife or children to prevent his creditors from levying thereon.

7. He may forfeit his estate; in some of the states this is one of the consequences of legal separation. Recently, the Supreme Court of Missouri decided that a divorce deprived him of his estate by the curtesy, even though he was the innocent party to the proceedings, for it was voluntary on his part. In some states the interest of an innocent husband in his wife's land still continues. The reasoning of the Missouri court is very persuasive.

8. In concluding this section it may be added that

[1] 1 Washburn, § 343, p. 157.

[2] 1 Washburn, § 341, p. 156.

this right of curtesy, which has long been recognised in Anglo-Saxon society, is founded on the idea that the husband is bound to maintain his children, and therefore it is proper that the wife's property should, to some extent, be devoted to the same purpose. The property rights of married persons have been greatly changed by legislation during the last fifty years. Thus, a woman is entitled after marriage to retain and acquire property very much as an unmarried one; also to make contracts with great freedom; consequently, in many states, a husband's right by the curtesy in his wife's real estate after her death has been abolished. In a few the right remains greatly modified, so a statement of the leading principles pertaining to the subject has been given.

§ 3. By Widow as Dower

1. Dower defined.
2. Priority of husband's creditors.
3. To what estate dower belongs.
4. She must join in every deed with her husband, to convey a good title to his land.
5. There must have been a valid marriage.
6. How her dower may be lost.
7. Assignment of dower to her.
8. Modes of assigning it.
9. Her remedy when it is not assigned.
10. Assignment of money in lieu of dower.
11. Provision by jointure.
12. Provision by will of testator in lieu of dower.

1. Dower is the interest a wife possesses in her husband's land after his death, and is largely regulated by statute.[1] Usually, it is an interest for life in the use of one-third of his real estate. As long as the married relation exists, her interest is in the nature of an encumbrance, or inchoate right, which she cannot assign or sell except by joining in a deed with her husband. At his death the right becomes consummate or perfected; until then, it is not an estate, strictly speaking, in any land. The setting apart of land for her use is called the assignment of dower; and, when this is done, she has a life-estate therein with all the rights and incidents pertaining to an estate of that character.

2. In some states she holds her dower subject to the claims of her husband's creditors; generally, her dower is preferred to them. Of course, a mortgage or other lien of that nature on the land, existing at the time of his death, is not impaired by that event; but the ordinary claims of creditors against him cannot be transformed into legal judgments and her dower lands be taken in payment.

3. A widow has dower in any estate belonging to her husband which her children, if any, could have inherited as his heirs. It includes everything definable as land. She, therefore, has a dower in land that has been mortgaged by him, subject to the mortgage; in short, to all estates in which he possesses an equitable as well as a legal interest. But it does not include an estate held by him as a trustee.

When the wife's dower is in mortgaged land, her

[1] See Vol. VI., Chap. I., Sec. 3, § 23.

interest does not become complete until after the foreclosure and satisfaction of the mortgagor's claim. Her dower then attaches to the remainder, and she is entitled to the use of such a portion as the law prescribes.

Again, when it is necessary that land in which she possesses an interest should be sold, her right will follow and attach to the proceeds of the sale.

Of course, the widow's right of dower in her husband's land is affected by his title thereto. If he was never the possessor before and after marriage, because another person was in possession as adverse owner, dower will not attach. In such a case her right will become effective only after he has recovered possession. No length of time is required after his possession to secure her right of dower. The vesting of the possession in him, even for a short period, is sufficient.

To this rule must be noted an exception. She will acquire no dower interest in land of which her husband may be the nominal possessor. For example: sometimes a conveyance cannot be made directly to a person, but only through the medium of another. Should this medium happen to be a married person, his wife would acquire no dower in the land of which, for a moment, he was the legal owner. Another example may be given—that of a mortgage. Suppose a married man should purchase a piece of land and give a mortgage thereon to the vendor for a part or all of the purchase price. Strictly speaking, there is a moment of time during which he is the entire owner. In truth, it was not intended between the parties that the wife should acquire a dower or inchoate right therein which should precede the mortgage's

interest. Save exceptions of this character, the wife is entitled to dower in all of the lands of her husband, wherever they may be, subject to the laws of the place where they may be located.

4. By reason of her inchoate right or interest in her husband's land, the law requires, in nearly all the states of the Union, that she should sign every deed conveying it, in order to insure a good title to the purchaser. This requirement is now well understood, and blank deeds are usually printed conforming with the law. Not infrequently the wife has not signed, doubtless from accident, and therefore has given a defective title, amended, perhaps, if at all, at considerable cost and after long delay. The legal requisites pertaining to the execution of such deeds are defined by the statutes of the different states.

5. Like an estate by the curtesy, a legal marriage is necessary to sustain an estate of dower. If it is a marriage which can be set aside, but is not, then it is known in the law as a voidable marriage, which, unless avoided during his lifetime, will sustain her right of dower on his death.

6. The wife's right of dower may be lost or barred by a legal separation or divorce. By a remarriage, or a setting aside of the divorce, her dower rights revive. In other words, it is necessary to support her claim to dower that she should be the wife of the husband at his decease. Consequently, if they have been divorced, whatever may have been the cause, the dower is extinguished, unless the statutes, as some of them do, contain a saving clause, giving the innocently divorced wife the right to enjoy her dower as if she were still his wife.

Again, her dower may be lost by the defeat or destruction of her husband's estate. For example, another person may claim the title and by a proper legal procedure, prove his better title thereto and thus become the possessor. In such cases, in which the husband really has no estate at all or in which it has been taken away from him by legal process, her interest therein also fails. Or, to change the form or expression, she cannot acquire or preserve a dower estate after her husband fails to acquire or preserve a still greater one.

While this is the law, the wife's inchoate right of dower cannot be affected by the action of an adverse possessor of her husband's land during the period of marriage, or, to use a technical term, during coverture.

Her right may be defeated by the exercise of eminent domain by the state. This exercise of public power is paramount to every individual right in land, and applies as much to women under all conditions as to men.

7. On the husband's death his wife is entitled to an immediate assignment of her dower. Until the assignment is made, for a period of forty days she has a right, at common law, to reside in the principal house on the estate, provided she does not marry within that time. This right is called her quarantine. The common law period has been changed in many states by statute. The general rule is that dower must be set out to her during this period; if it be not, the law prescribes for her the remedy.

8. There are two modes of assigning dower, which may be briefly described. The dower of "common right," so called, is to give her a definite piece of real

estate. This is done by the sheriff under proper directions from the court. The kind of land set out to her depends largely on its nature, location, etc., and need not be more fully described. The extent of her one-third interest is determined by the market and productive value of the land, instead of the quantity. She is entitled to such a portion of the estate as will yield to her one-third of the rents and profits of the whole.

The other mode of assignment is called "against common right." This is done by agreement. This mode will effectually bar the claim to dower of common right, if properly and legally executed. In adopting this mode it is the common practice for the widow to give a release under seal of her dower right.

9. On refusal to assign dower to her, as the law requires, she may have recourse to ample remedies. One of them is an action at law to recover it; another is a similar proceeding in equity; a third and more common practice is a summary proceeding in the court having direction of the settlement of the estate. The action must be brought in the county where the land lies, to which the law of that place must be applied. As the action is personal it dies with the widow.

Success in her action is followed by judgment for the assignment of dower and sometimes for damages, also for the delay in assigning it, though not at common law. They are a matter strictly of statute.

10. In some states, by statute, money is assigned instead of land as dower. A gross sum is assigned in such cases instead of an annual share in the income.

11. Again, dower may be barred by a jointure, which

is a provision made for the wife by the husband out of his property. This is done before marriage, and is a complete bar to her dower only when made before that event. When made afterward she has a right to elect whether to take her jointure or her dower, but cannot take both. Formerly, jointures were frequently made, but, of late years, they have given way to marriage settlements, or specified agreements in which the terms greatly vary with circumstances.

12. Finally, a testator sometimes provides for his widow in lieu of dower. This is not unusual. After he has done so she can elect either to take what the testator has given her, or to reject it and claim her right of dower. Suppose, for example, that a testator should possess a large amount of real property, and in his will should give his wife a comparatively small sum of money on condition of renouncing her right of dower, very likely she would reject the legacy and claim her right of dower, as she has often done. If she accepted the legacy it would completely extinguish her right or interest in the real estate.

§ 4. By Homesteaders

1. Object of legal protection of homestead.
2. Constitutionality of the laws.
3. Right cannot be affected by subsequent legislation.
4. How the courts regard homestead laws.
5. What is a homestead.
6. Amount of land it includes.
7. Meaning of head of family.

8. What debts for which homestead cannot be taken.
9. What rights the homesteader can exercise.
10. How homestead can be destroyed.
11. Wife must join in conveying homestead.

1. Many of the states, within a comparatively short period, have conferred rights on the owners of homesteads. Their principal object is to protect them from seizure for the debts of their owners. Such a policy is deemed worthy by the state, as other persons beside the homesteaders are interested in their preservation.

2. As the federal constitution prohibits the states from passing laws impairing contract obligations, no state can withdraw the land of an individual from his contemporaneous creditor. Could a homesteader beguile his creditors with the knowledge of his great possessions and afterward secure such legislation, they would be greatly wronged.

The constitutional provision relates solely to contracts between individuals, and to no other kind of property. But a judgment rendered in an action not founded on a contract, but on a wrong, is not affected by this constitutional requirement. Consequently, a homestead law preserving the land of a homesteader from such a judgment would not be an invasion of the constitution, because the wrong-doer's liability did not spring from the violation of a contract.[1]

3. The homestead right, having once attached to the land, cannot be changed, without the owner's consent,

[1] McAfee v. Covington, 71, Ga., 272.

by subsequent legislation. Thus, an exemption of a specified number of acres of land in the country or city, which has been impressed with a homestead character, cannot be affected by the subsequent incorporation of the land without the owner's consent. The owner may, however, abridge his right by dividing it into parcels and offering them for sale.

4. At first the courts, looking on homestead legislation with an unfriendly eye, construed it strongly against the homesteader. Through more familiarity with its operation and with the growth of public sentiment, the courts now give full effect to its intent and purpose.

5. A homestead, within the meaning of this law, is the home or permanent place or residence of the owner of the land, and includes the area specifically prescribed, which varies greatly in the different states. Nor is its character changed by the owner's temporary absence. On the other hand, it does not partake of this character through mere intention. The same rule does not apply to such land as applies to land acquired by a person for the purpose of exercising the right of suffrage. To stamp land as a homestead it must be used as a home.

6. Whether the amount of land that may be thus marked must consist of a single piece, or may consist of several pieces, is an open question. In an Arkansas town a person purchased one-third of a town lot, on which was a building wherein he kept a retail store. Afterward, he purchased the remainder of the lot and erected thereon a residence. Though the parts were separated by a fence, the entire lot still retained its

homestead character. Nor was its character as a homestead affected by mortgaging the residential portion only and by a relinquishment on the part of the owner's wife of her dower rights therein.

Again, when a statute prescribes that the land must be a single tract or piece, can any portion extend on the other side of a street? If the owner is also the owner of the land in the highway, the public simply possessing an easement or right of way over the same, the tract is regarded as an entirety and within the law; but if the several portions, claimed as a homestead, are separated by a street which belongs to the public, the owner can claim as a homestead only that piece or portion on which his house is situated.

7. Of two or three other questions perhaps the most important is, what is meant by the head of a family, a phrase contained in every homestead act? Any person, man or woman, married or unmarried, on whom rests the duty to provide for the support of one or more persons sustaining the family relation. For example, an unmarried man with whom reside his widowed sister and her children; or, for a simpler illustration, a man who supports his mother. An unmarried woman with whom live the children of a deceased sister is considered by the homestead law as the head of the family. Furthermore, they need not all live under one roof, or be employed about the house. It is the relation and the dependence on that relation, not the mere aggregation of individuals, that constitute the family. On the other hand, the moral obligation will not suffice if the dependents do not reside with the homesteader, even if he actually supports

them; nor is a temporary support sufficient. Finally, the obligation to support must not arise simply from contract alone, as distinguished from obligation founded on dependence.

8. Let us ascertain more definitely what debts are outside the pale of homestead legislation. Taxes for municipal purposes may be collected; and purchases for improvements are a lien on the land. Thus, in Georgia, the expenses of an attorney, rendered in defeating a homestead, were considered as somewhat akin to purchase money. Furthermore, the original debt retains this character, and cannot be extinguished by any assignment or renewal. But money borrowed to pay off a pre-existing debt does not come within the rule. On the other hand, a person who advances purchase money at the time of buying, for the express purpose of securing a conveyance to the vendee, on his promise to execute a mortgage for the amount, has a lien on the land therefor.

9. The head of a family can sell or mortgage his homestead, whether he is solvent or insolvent; and his creditors cannot prevent the sale, for, having no claim on the homestead, their rights are not impaired. His right is equally complete to dispose of one homestead and with the proceeds to acquire another, which is just as safe from the invasion of creditors.

10. A homestead may be destroyed or abandoned, but premises that have once been impressed with a homestead character do not lose it by the removal of the dependent members by death or marriage. In other words, while no man who is not the head of a family can become a homesteader, he may cease to be a family-head

without ceasing to be a homesteader. Again, there must be a substantial compliance with the statute prescribing a form of waiver for abandoning a homestead; no expression of intention will be effectual. And whether one has abandoned his homestead, or not, is a question of combined residence and intention. Temporary absence for purposes of health and pleasure will not work an abandonment, but a departure with the intention of abandoning the premises as a permanent residence will destroy its homestead character.

11. The statutes generally prescribe that the homestead of a married homesteader shall be conveyed only with his wife's consent.[1]

[1] See Vol. VI., Chap. L., Sec. 3, § 14.